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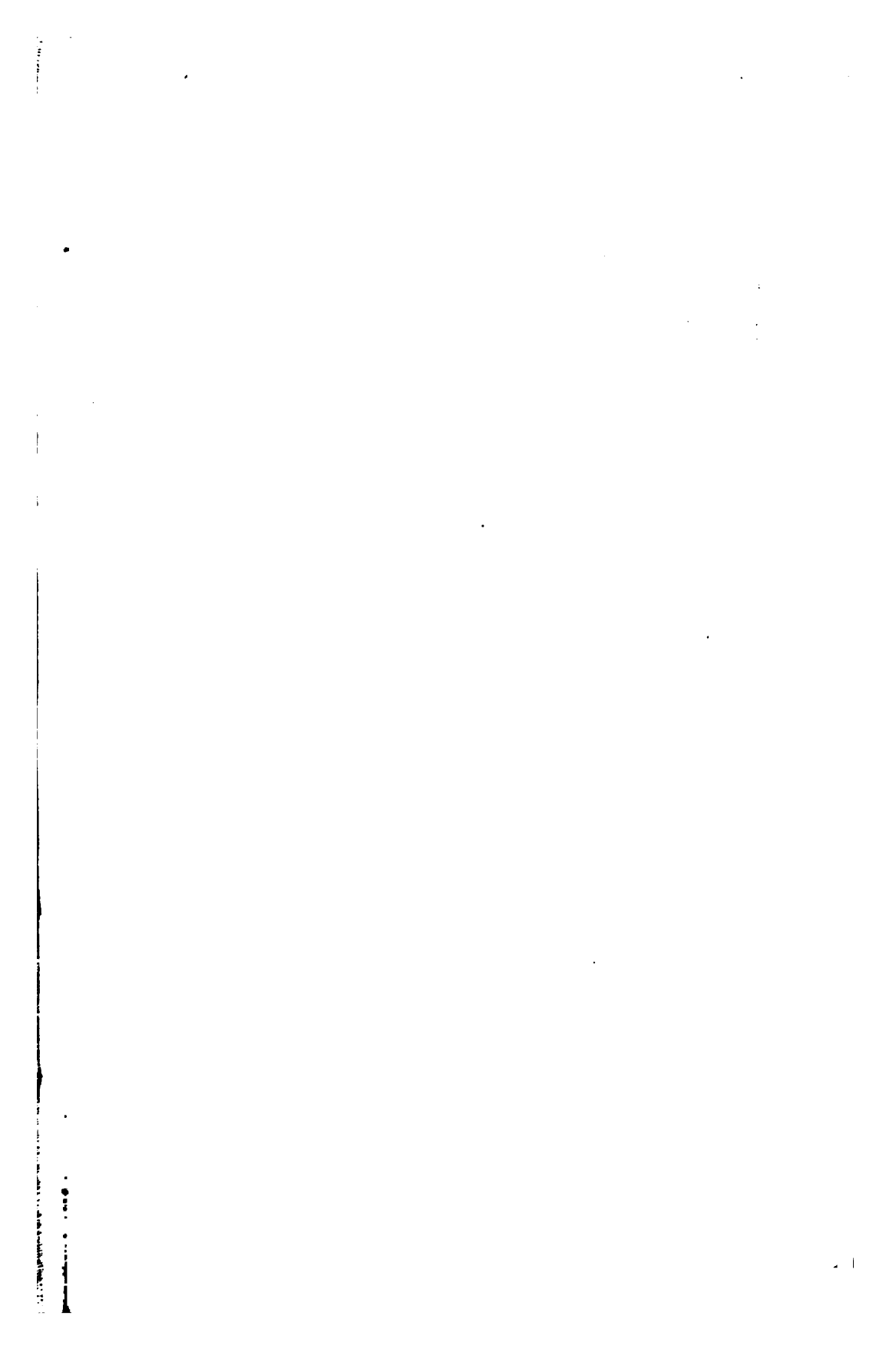
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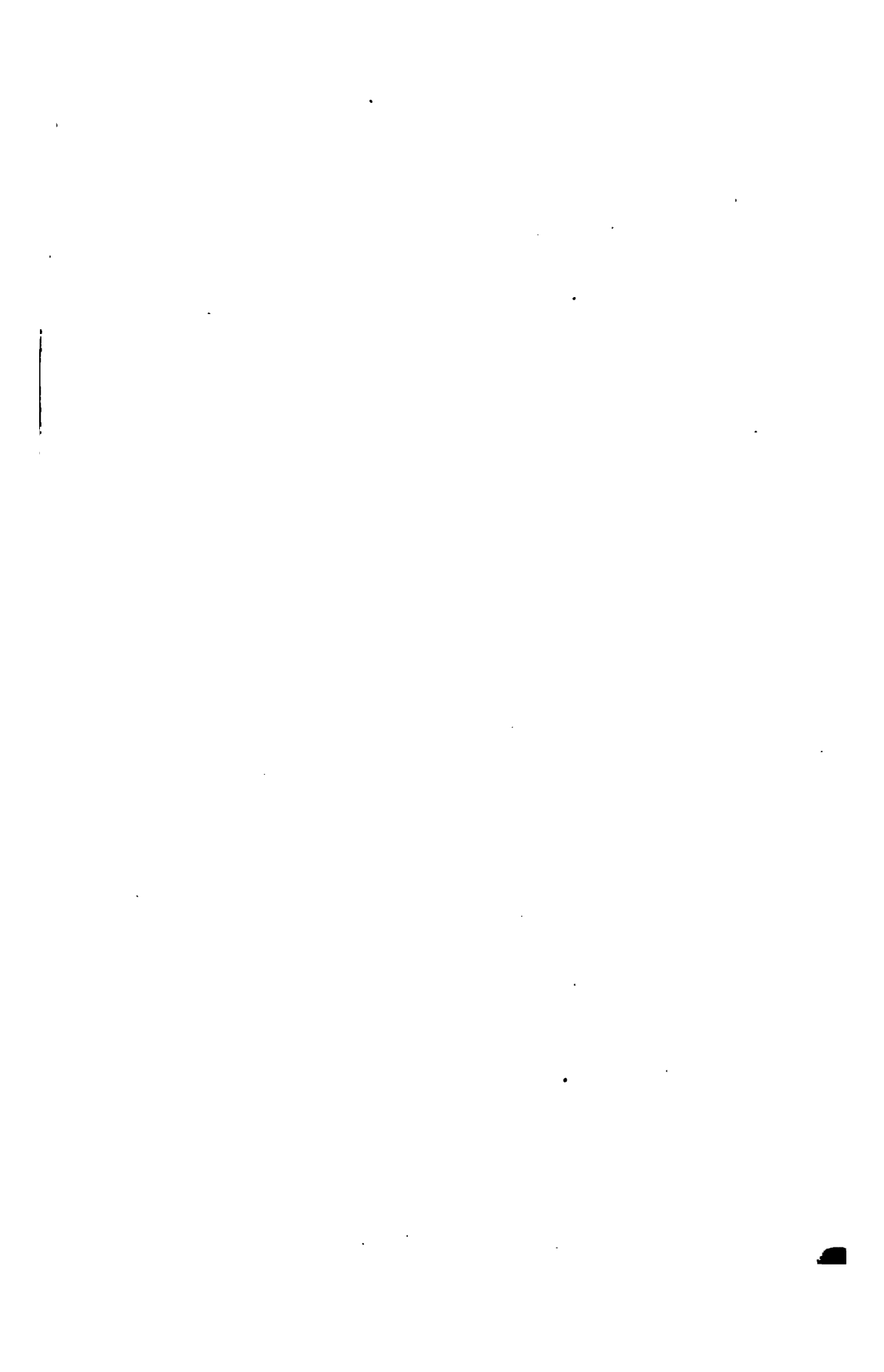
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followed by page.

TABLE OF CASES REPORTED.

A.

Acres v. George.....	211
Adsit ats. People.....	390
American Telegraph & Telephone Co. ats. Dunbar.....	1
American Trust & Savings Bank v. Imperial Hotel Co...	94
Anonymous	207
Arthur v. Doyle.....	213
Aurora Insurance Co. ats. Meyer.....	225

B.

Bassett v. Fahey.....	237
Beasley ats. Curtice.....	351
Beifeld v. Chicago & Northwestern Railway Co.....	507
Bingham v. Jackson.....	221
Bordeaux Co. ats. Havemayer.....	35
Botts ats. People.....	393
Brackett v. People.....	452
Brainard v. Brainard.....	427
Bruley v. The Royal League.....	313
Burton v. Green.....	212

C.

Cannon ats. People.....	265, 277, 283
Chicago ats. Daggett.....	79

Chicago Hydraulic Pressed Brick Co. ats. Union Pressed Brick Co.	290
Chicago & Northwestern Railway Co. ats. Beifeld.....	507
Clark v. Robinson.....	524
Clingman v. The World's Columbian Exposition Co....	
.....	366, 448, 452
Couch ats. Glover.....	384
Couch ats. Rice.....	384
Crangle v. Sloucen.....	380
Curtice v. Beasley.....	351

D.

Daggett v. Chicago.....	79
Davis ats. People.....	516
Dorman ats. St. Louis & Southeastern Railroad Co....	353
Dowie ats. Stevenson.....	135
Doyle ats. Arthur.....	213
Drake v. Rollo.....	262
Dunbar v. American Telegraph & Telephone Co.....	1
Durgon v. McGuire.....	310

E.

Eichhold v. Greenebaum.....	256
Equitable Mutnal Fire Insurance Co. v. McGrea.....	110

F.

Fahey ats. Bassett.....	237
Field Museum of Natural History ats. Ward.....	226

G.

George ats. Acres.....	211
Gilbert ats. People.....	61
Glover v. Couch.....	384
Green ats. Burton.....	212
Green ats. Littlefield.....	429, 434
Greenebaum ats. Eichhold.....	256
Gregory v. Wilson.....	442

H.

Hanchett ats. People.....	251
Harrington v. Stees.....	444
Havemayer v. Bordeaux Co.....	35
Howell, Millsbaugh & Co. v. Morlan.....	443

I.

Imperial Hotel Co. ats. American Trust & Savings Bank	94
---	----

J.

Jackson ats. Bingham.....	221
Jones ats. Pearson.....	352

L.

Lamble, In re Estate of James, deceased.....	373
Lewis v. Mayo.....	308
Littlefield v. Green.....	429, 434
Location of Road in Menard County, In the matter of..	208
Long, Estate of James, deceased.....	53

Mc.

McClara ats. People.....	393
McCrea ats. Equitable Mutual Fire Insurance Co.....	110
McGuire ats. Durgon.....	310
McLain ats. People.....	501
McNeeley v. Wright.....	443

M.

Mayo ats. Lewis.....	308
Menard County, In the matter of the Location of Road in	208
Meyer v. Aurora Insurance Co.....	225
Morlan ats. Howell, Millsbaugh & Co.....	443
Moss v. Village of Oakland.....	524
Myers ats. People.....	477

O.

Oakland, Village of, ats. Moss.....	524
-------------------------------------	-----

P.

Paulsen ats. People.....	445
Pearson v. Jones.....	352
Pease ats. People.....	65, 125
Penn Mutual Life Insurance Co. ats. Wachsmuth.....	353
People v. Adsit.....	390
People v. Botts.....	393
People ats. Brackett.....	452
People v. Cannon	265, 277, 283
People v. Davis	516
People v. Gilbert	61
People v. Hanchett	251
People v. McClain	501
People v. McClara	393
People v. Myers	477
People v. Paulsen	445
People v. Pease	65, 125
People v. Perkins	492
People v. Potter	393
People v. Reeves	48
People v. Shea	99
People v. Walser	58
Perkins ats. People.....	492
Potter ats. People.....	393

R.

Reeves ats. People.....	48
Rice v. Couch.....	384
Roberts v. Stigleman.....	350, 444
Robinson ats. Clark.....	524
Rollo ats. Drake.....	262
Rosenthal ats. Smith.....	302
Rosenthal ats. Wilkins.....	374
Royal League ats. Bruley.....	313

S.

St. Louis & Southeastern Railroad Co. v. Dorman.....	353
Shea ats. People.....	99
Sloucen ats. Crangle.....	380
Smith v. Rosenthal.....	302
South Shore Transportation Co. v. World's Columbian Exposition	20
Stees ats. Harrington.....	444
Stevenson v. Dowie.....	135
Stigleman ats. Roberts.....	350, 444

T.

Thompson, In the matter of Amanda B.....	248
--	-----

U.

Union Pressed Brick Co. v. Chicago Hydraulic Pressed Brick Co.....	290
---	-----

W.

Wachsmuth v. Penn Mutual Life Insurance Co.....	353
Ward v. Field Museum of Natural History.....	226
Walser ats. People.....	58
Wilkins v. Rosenthal.....	374
Wilson ats. Gregory.....	442
World's Columbian Exposition Co. ats. Clingman....	366, 448, 452
World's Columbian Exposition ats. South Shore Trans- portation Co.....	20
Wright ats. McNeeley.....	443

TABLE OF CASES CITED

A.

Adams v. Buzine (4 Harr. Del. 572), 104.
Ainsworth v. United States (1 Appeal Cas. 518), 414.
Allen v. Flood (42 Solicitor's Journal, 149, App. Cas. [1898] 1), 521.
Allen v. Soldiers' Business Messenger and Dispatch Co. (4 Bankruptcy Register, 176), 226.
Ancient Order of Pyramids v. Drake (66 Kan. 538, 72 Pac. 239), 346, 347.
Ancient Order U. W. v. Jesse (50 Ill. App. 101), 342.
Anderson v. Poindexter (6 Ohio State, 622), 306.
Anderson v. State (Tex. 11 S. W. 33), 417, n.
Armstrong v. American Bank (133 U. S. 433), 120.
Aspinwall v. Queen's Proctor (2 Cur. Ecc. 248), 378.
Audre v. Modern Woodmen (102 Mo. App. 377), 346, 347.
Augustine v. Doud (1 Ill. App. 588), 98.
Austin v. Murray (16 Pick. 121), 77.

B.

Backus v. Detroit (49 Mich. 110), 31.
Baird v. Shipman (132 Ill. 16), 421, n.
Baker v. Scott (62 Ill. 86), 57.

Baldwin v. Begley (185 Ill. 180), 330.
Bank of Orleans v. Flagg (3 Barb. Ch. 318), 364.
Barnes v. Chicago Typographical Union (232 Ill. 402), 281.
Battin v. Northwestern Mut. Life Ins. Co. (130 Fed. 874), 333.
Beggia, In the goods of (1 Add. Ecc. 340), 378.
Bennet v. Union Central Ins. Co. (203 Ill. 439), 333, 347.
Betzer's Executor v. Hahn (14 S. & R. 232), 260.
Bishop v. American Preservers Co. (157 Ill. 284), 122.
Blackburn v. Hawkins (1 Eng. 50), 259.
Blackerby v. People (10 Ill. 266), 280.
Blank v. Illinois Central R. R. Co. (182 Ill. 332), 509.
Board of Supervisors of Livingston Co. v. Welder (64 Ill. 427), 469, 470.
Board of Trustees of Schools, etc. v. People (63 Ill. 229), 469.
Boddie v. Brewer & Hoffmann Brewing Co. (107 Ill. App. 357), 218.
Bonard v. Banking (94 Mo. App. 450), 346.
Booth v. Hodgson (6 T. R. 405), 122.
Borgraefe v. Supreme Lodge K. & L. of H. (22 Mo. App. 127), 341.
Bouton v. Cameron (205 Ill. 59), 365.

- Bowne v. Page (2 Tyler, 393), 363.
 Boyce v. Royal Circle (99 Mo. App. 349, 73 S. W. 300), 337.
 Bradley v. Angel (3 N. Y. 475), 264.
 Branch v. Jesup (106 U. S. 468), 43.
 Brayman v. Grand Lodge (122 Mo. App. 354), 347.
 Brooklyn Park Commissioners v. Armstrong (45 N. Y. 234), 461.
 Brooks v. Martin (2 Wall. 70), 119, 121.
 Brown v. Supreme Court (68 N. E. 145, N. Y.), 346, 347.
 Burdick, In re (162 Ill. 48), 75, 127.
 Burdick v. Blook (1 Hill, 130), 497.
 Burdick v. People (149 Ill. 48), 75.
 Burdick v. People (149 Ill. 600), 75, 127.
 Butler v. Huestis (68 Ill. 594), 57.
- C.**
- Camp v. Morgan (21 Ill. 255), 221.
 Campbell v. Logan (2 Bradf. S. R. 90), 259.
 Cannon v. Home Ins. Co. of N. Y. (53 Wis. 585, 11 N. W. 11), 333.
 Carroll v. Renich (7 Sm. & Mar. 798), 56.
 Casselberry v. Forquer (27 Ill. 170), 221.
 Chapman v. Kirby (49 Ill. 211), 511, 513.
 Cheney v. Arnold (15 N. Y. 345), 311.
 Chestnutwood v. Hood (68 Ill. 132), 372.
 Chetlain v. Republic Life Ins. Co. (86 Ill. 220), 45.
 Chicago v. Laffin (49 Ill. 172), 30.
 Chicago v. Rumsey (87 Ill. 348), 81, 464.
 Chicago v. Union Building Ass'n (102 Ill. 379), 28, 371.
 Chicago City Railway Co. v. Flynn (131 Ill. App. 502), 512.
 Chicago & Erie R. R. Co. v. Meech (163 Ill. 305), 511, 514.
 Chicago Life Ins. Co. v. Warner (80 Ill. 410), 333.
 Chicago, Pekin & Southwestern R. R. Co. v. Marseilles (84 Ill. 643), 45.
 Chicago, Rock Island & Pacific R. R. Co. v. Humler (215 Ill. 525), 509.
 Chicago, Rock Island & Pacific R. R. Co. v. Joliet (79 Ill. 25), 43, 462.
 Chicago Union Traction Co. v. Brethauer (223 Ill. 521), 512.
 Clark, In re (9 Wend. 212), 103, 104.
 Clark v. City of Providence (16 R. I. 337, 15 Atl. 763), 462.
 Cline v. Woodmen (111 Mo. App. 606), 346.
 Clinton Wire Cloth Co. v. Gardner (99 Ill. 151), 219.
 Coggs v. Bernard (Smith's Lead. Cas.), 60.
 Cohens v. Virginia (6 Wheaton, 399), 230.
 Columbia Carriage Co. v. Hatch (19 Tex. Civ. App. 120, 47 S. W. 288), 122.
 Commonwealth v. Daniels (6 Pa. Law Journal, 4 Clark, 417), 104.
 Commonwealth v. Dennison (24 Howard, 66), 279.
 Commonwealth v. Hunt (4 Metcalf, Mass. 134), 522.
 Commonwealth v. Wilson (14 Phila. 384), 78.
 Confrey v. Stark (73 Ill. 187), 51.
 Consolidated Coal Co. v. Block & Hartman Smelting Co. (53 Ill. App. 565), 334.
 Cook v. Sherman (4 McCrary, 26, 20 Fed. 167), 121.
 Corbin v. Wilson (2 Ash. 178), 260.
 Corning v. Smith (6 N. Y. 82), 362.
 Court of Honor v. Dinger (221 Ill. 176), 346.
 Coverdale v. Royal Arcanum (193 Ill. 91), 333, 343, 346.
 Cowan v. Curran (216 Ill. 598), 512.
 Cratty v. Peoria Law Library Ass'n (219 Ill. 516), 47.

D.

Daggett v. City of Chicago (24 Chgo. Legal News, 353, 3 Ill. C. C. 79), 233, 235.
 Darst v. Gale (83 Ill. 136), 43.
 Davidson v. Reed (111 Ill. 167), 455, 458.
 Davies v. Davies (4 Beav. 54), 56.
 Davis' Case (122 Mass. 324), 103.
 Dement v. Rohker (126 Ill. 174), 279.
 Denver v. Hayes (28 Colo. 110, 63 Pac. 311), 289.
 De Portibus Maris (1 Harg. Law Trac. 78), 33.
 Devine v. Board of Commissioners of Cook Co. (84 Ill. 590), 372.
 Dexter v. Harrison (146 Ill. 169), 491.
 Dole v. Olmstead (41 Ill. 344), 247.
 Doo Woon, In re (18 Fed. 898), 105.
 Dufield v. Cross (12 Ill. 397), 224.
 Dulaney v. Payne (101 Ill. 325), 214.
 Dunbar v. American Tel. & Tel. Co. (224 Ill. 9), 10.
 Dupee v. Boston, etc. Co. (114 Mass. 37), 45.
 Dutton v. Strong (1 Black, 23), 30, 33.
 Dwelling House Ins. Co. v. Dowdall (55 Ill. App. 622), 333, 349.

E.

Eagle Fire Ins. Co. v. Lent (6 Paige, 635), 362, 364.
 East St. Louis v. East St. Louis, etc. Co. (98 Ill. 415), 43.
 Emigrant Savings Bank v. Goldman (75 N. Y. 127), 364.
 Ensminger v. People (47 Ill. 384), 30.

F.

Farley v. St. Paul, etc. Ry. Co. (4 McCrary, 141, 14 Fed. 115), 122.
 Farmer v. Russell (Bos. & P. 29), 120.
 Fenix Ins. Co. v. Hart (149 Ill. 513), 344.

Fenton v. Reed (4 Johns. 52, 4 Am. Dec. 244), 311.
 Ferrie v. Public Administrator (3 Bradf. 249), 378.
 Ferrier, In re petition of (103 Ill. 367), 506.
 First Nat. Bank v. Peoria Watch Co. (191 Ill. 128), 47.
 Fitzsimmons v. Munch (79 Ill. App. 538), 511.
 Fletcher v. Tuttle (151 Ill. 41), 268.
 Foster v. C., C., C. & St. L. Ry. Co. (56 Fed. 434), 514.
 Foval v. Benton (48 App. 638), 363.
 Foval v. Hallett (10 Ill. App. 265), 491.
 Fraser v. Ritchie (8 Ill. App. 554), 45.
 Fry v. State (63 Ind. 555), 76.
 Frye v. Partridge (82 Ill. 273), 72.
 Fullenwider v. Royal League (180 Ill. 621), 330.

G.

Gage v. Perry (93 Ill. 176), 362.
 Garthshore v. Charlie (10 Ves. 1), 260.
 Gaylord v. Ft. W., M. & C. R. R. Co. (6 Bissell, 286), 98.
 Germania Life Ins. Co. v. Koehler (168 Ill. 293), 344.
 Gibson v. Richmond & D. R. Co. (37 Fed. 743), 46.
 Globe Ins. Co., In re (2 Edw. Chan. 625), 264.
 Godfrey v. City of Alton (12 Ill. 29), 235.
 Goodwin v. Mix (38 Ill. 115), 247.
 Grand Lodge v. Beaty (224 Ill. 350), 347.
 Grand Lodge v. Brand (29 Neb. 644, 46 N. W. 95), 345.
 Grand Lodge v. Jesse (50 Ill. App. 101), 336.
 Grand Lodge v. Lachman (199 Ill. 140), 348.
 Greenough, In re (31 Vt. 279), 103.
 Gregory's Administrator, In re (19 Ohio, 357), 259.

Gregory v. Wilson (36 N. J. L. 315), 122.
Grogan v. Town of Hayward (6 Sawyer, 498, 4 Fed. 161), 459.

H.

Hagan v. Lucas (10 Pet. 400), 383.
Hamburg-American Packet Co. v. Gattman (127 Ill. 598), 510, 513.
Hammond v. Hammond (2 Bland. Ch. 306), 260.
Hanna v. Read (102 Ill. 596), 219.
Hardcastle v. Fisher (24 Mo. 70), 244.
Harding v. American Glucose Co. (182 Ill. 551), 11, 12.
Harrison v. Mexican Ry. Co. (44 L. J. Ch. 403), 43.
Harvard v. St. Clair, etc. Drainage Co. (51 Ill. 130), 469.
Hawkins v. Harding (35 Ill. App. 25), 130.
Hazlehurst v. Savannah, etc. Ry. Co. (43 Ga. 13), 43.
Henderson v. Henderson (3 Hare, 115), 218.
Hennessy v. Metropolitan Life Ins. Co. (74 Conn. 699, 52 Atl. 490), 345.
Hereford v. People (197 Ill. 222), 489.
Hibernian Bkg. Ass'n v. Law (88 Ill. App. 18), 363.
Higgins v. Lansingh (154 Ill. 301), 46.
High Court Order of Foresters v. Schweitzer (171 Ill. 325), 346, 347.
Hodgman v. People (4 Denio, N. Y. 235), 53.
Hoke v. Henderson (4 Dev. N. C. 15), 499.
Holbrook v. Receivers (6 Paige, 220), 264.
Holmes v. City of Mattoon (111 Ill. 27), 280.
Hopkins v. McCann (19 Ill. 113), 361.
Hopkins v. Oxley Stave Co. (83 Fed. 912), 299.
Horn v. People (26 Mich. 221), 31.

House of Refuge v. Ryan (37 Ohio St. 197), 506.
Huguenin v. Baseley (17 Vesey, 273), 177, 194, 196, 197.

I.

Illinois Central R. R. Co. v. Anderson (184 Ill. 294), 509.
Illinois Central R. R. Co. v. Beebe (174 Ill. 13), 509.
Illinois Central R. R. Co. v. Byrne (205 Ill. 9), 512, 514.
Illinois Central R. R. Co. v. Illinois (146 U. S. 387), 23.
Illinois Life Ass'n v. Wells (102 Ill. App. 544), 333.

J.

Jackson v. McLean (36 Fed. 213), 122.
Jacksonville v. Jacksonville Ry. Co. (67 Ill. 540), 458.
Jacobs, In re (98 N. Y. 98), 70, 78.
Jewell v. Jewell (1 How. 219), 311.
Johannes v. Kielgast (27 Ill. App. 576), 220.
John Hancock Mut. Life Ins. Co. v. Schlink (175 Ill. 284), 345.
Johnson v. Johnson (30 Mo. 73), 305, 312.
Jones v. Robinson (26 Barb. 310), 264.

K.

Keegan v. Kinnare (123 Ill. 280), 219.
Kehm v. Mott (187 Ill. 519), 365.
Kellogg v. Larkin (3 Pinney, 123), 116.
Kerswell ats. Coburn (35 Me. 126), 105.
King v. Arney (114 Ill. App. 141), 221.
King v. Winants (71 N. C. 469), 122.
Kingsbury's Case (106 Mass. 223), 103.
Kirk v. Morron (6 Helsk. Tenn. 445), 122.
Kirpatrick v. Gibson (2 Brock. 388), 261.

Knights of Pythias v. Withers (177 U. S. 261), 346, 347.
Kocher v. Supreme Council, Catholic Benevolent Legion (65 N. J. L. 649, 52 L. R. A. 861), 334, 342.
Kostor v. Easen (2 Maule & Selwyn, 112), 264.

L

Lake Shore & Michigan Southern Ry. Co. v. Hochstin (67 Ill. App. 514), 510.
Landis v. Wolf (206 Ill. 392), 512.
Lehman v. Strassberg (2 Woods, 563, Fed. Cas. No. 8,216), 120.
Lemon v. Grosskopf (22 Wis. 447), 122.
Lewis v. Smith (9 N. Y. 502), 363.
Lewiston, Town of, v. Proctor (23 Ill. 533), 250.
License Cases (5 How. 583), 70.
Lighty v. French (9 Ind. 475), 432.
Lloyd v. Mayor (5 N. Y. 869), 81.
Lockhart v. Public Administrator (4 Bradf. S. R. 21), 259.
Lockhart v. Van Alstyne (31 Mich. 76), 43.
Lucas v. La Compte (42 Ill. 303), 221.
Lutz v. Anchor Fire Ins. Co. (120 Iowa, 136, 94 N. W. 272), 333.
Lyon v. Fishmonger's Co. (L. R. 1 App. Cas. [1876] 662), 30.

M

Macanley v. Schackell (1 Bligh, N. S. 96), 299.
Manchester, Peter B., In the Matter of (5 Cal. 237), 104.
Mann v. Currie (2 Barb. 294), 46.
Martin v. Martin (6 Watts. 67), 260.
Mason, In re (3 Wash. St. 609, 28 Pac. 1025), 506.
Mathias v. Cook (31 Ill. 83), 221.
Mayer v. Erhardt (88 Ill. 452), 230.

Maywood Co. v. Maywood (118 Ill. 61), 455, 457.
McDaniels v. Flowerbrook Mfg. Co. (22 Vt. 274), 46.
McDole v. McDole (106 Ill. 452), 214.
McKee v. Ingalls (4 Seam. 30), 491.
McMahon v. Maccabees (161 Mo. 543), 346.
McMullen v. Hoffman (174 U. S. 639), 122.
Metropolitan Life Ins. Co. v. Sullivan (112 Ill. App. 500), 333.
Mexican Banking Co. v. Lichtenstein (10 Utah, 343), 122.
Millett v. People (117 Ill. 305), 72.
Milwaukee Industrial School v. Milwaukee County (40 Wis. 328, 22 Am. Rep. 702), 506.
Modern Woodmen v. Coleman (94 N. W. 814), 347.
Modern Woodmen v. Coleman (64 Neb. 162, 89 N. W. 641), 333, 346.
Modern Woodmen v. Lane (62 Neb. 89, 86 N. W. 943), 333.
Moerschbaeher v. Royal League (188 Ill. 9), 330, 340.
Moerschbaeher v. Royal League (88 Ill. App. 89), 344, 350.
Moline Water Power Co. v. Webster (26 Ill. 233), 361.
Moore v. Bennett (140 Ill. 69), 10, 12.
Moore v. Mayfield (47 Ill. 167), 433.
Morgan v. McGee (5 Humph. 13), 312.
Morris v. De Witt (5 Wend. 71), 382.
Morrison v. Bennett (20 Mont. 560, 52 Pac. 553), 122.
Morrison v. Hinkson (87 Ill. 587), 458.
Mowery v. City of Providence (16 R. I. 422, 16 Atl. 511), 462.
Mullen, John, In re (112 Ill. 551), 253.
Munn v. Illinois (94 U. S. 113), 33, 60.
Murphy v. Independent Order (77 Miss. 842), 347.
Myers v. Kinzie (26 Ill. 36), 240.

N.

Nashville, C. & St. L. Ry. Co. v. McConnell (82 Fed. 65), 300.
 National Council v. Burch (126 Ill. App. 15), 346.
 Nelson v. Borchentius (52 Ill. 236), 491.
 Newark v. Stockton (44 N. J. Eq. 179), 463.
 Nickerson v. Rockwell (90 Ill. 460), 221.
 Norris v. State (25 Ohio St. 217), 103.
 Northern Assurance Co. v. Grand View Building Ass'n (183 U. S. 308), 331, 333.
 Northwestern Mutual Life Ins. Co. v. Ammerman (119 Ill. 329), 340.
 Norton v. Rely (2 Eden, 286), 194.

O.

Oakes v. Williams (107 Ill. 154), 280.
 Ogen v. Stock (34 Ill. 522), 383.
 Ogilvie v. Ogilvie (1 Bradf. S. R. 356), 260.
 O'Hara v. Jones (46 Ill. 228), 247.
 Order of Foresters v. Schweitzer (171 Ill. 325), 344, 346.
 Orient Ins. Co. v. McKnight (197 Ill. 190), 344.
 Osgood v. De Groat (36 N. Y. 348), 264.

P.

Parsons v. Hayes (14 Abbott's New Cases, 419), 46.
 Pearsons v. Pearsons (1 Sch. & Lef. 10), 260.
 Pease v. Ritchie (132 Ill. 638), 116.
 Pease v. Trench (98 Ill. App. 24), 333.
 Pelkington v. National Ins. Co. (55 Mo. 172), 333.
 Penn Mutual Life Ins. Co. v. Bradley (21 N. Y. Supp. 876), 121.
 People v. Bangs (24 Ill. 184), 250.

People v. Barrett (203 Ill. 99), 268.
 People v. Board of Trade (193 Ill. 577), 279.
 People v. Bradley (60 Ill. 390), 130.
 People v. Brady (56 N. Y. 182), 105, 108.
 People v. Chicago (193 Ill. 507), 279.
 People v. Chicago Gas Trust Co. (130 Ill. 258), 10, 11, 12.
 People v. Church (2 Wend. 261), 381.
 People v. Cook (8 N. Y. 4 Seld. 68), 437.
 People v. Cooper (83 Ill. 586), 72.
 People v. Crabb (156 Ill. 155), 279.
 People v. Davis (1 Ill. C. C. 217), 414, n.
 People v. Doody (64 N. E. 807, 172 N. Y. 165), 490.
 People v. Dupuyt (71 Ill. 651), 469, 470, 473.
 People v. Hanchett (111 Ill. 90), 255.
 People v. Illinois State Reformatory (148 Ill. 413), 129, 131.
 People v. Jones (173 Ill. 316), 78, 127, 132.
 People v. Maynard (14 Ill. 419), 251.
 People v. Mayor (51 Ill. 17), 464.
 People v. Meech (101 Ill. 200), 72.
 People v. Pinkerton (77 N. Y. 245), 103.
 People v. Salomon (51 Ill. 37), 464, 465.
 People v. Thistlewood (103 Ill. 139), 130.
 People v. Trustees of Schools (78 Ill. 136), 469, 470.
 People v. Turner (55 Ill. 280), 129, 131.
 People v. Walsh (96 Ill. 232), 463.
 People v. Warden of City Prison, etc. (51 N. E. 1006, 157 N. Y. 116), 132.
 People v. Warden (26 App. Div. 228), 77.
 People v. Weber (86 Ill. 283), 279.

Peoria & Springfield R. R. Co. v. Thompson (103 Ill. 187), 43.
 Perteeet v. People (70 Ill. 171), 280.

Phoenix Ins. Co. v. Grove (116 Ill. App. 529, affirmed 215 Ill. 299), 333.

Phoenix Ins. Co. v. Maxon (42 Ill. App. 164), 332, 337.

Phoenix Ins. Co. v. Raddin (120 U. S. 183), 345.

Platt v. People (29 Ill. 55), 437.

Planters' Bank v. Union Bank (16 Wall. 483), 120.

Port of Mobile v. Louisville & N. R. Co. (84 Ala. 115, 4 So. 106), 300.

Powell v. Pennsylvania (127 U. S. 678), 71.

Prescott, Ex parte (1 Atk. 230), 264.

Prescott v. State (19 Ohio St. 184, 2 Am. Rep. 388), 506.

Price v. Thompson (48 Mo. 361), 459, 464.

Public Administrator v. Hughes (1 Bradf. 125), 378.

Puzzel v. Still (63 Vt. 490), 363.

Q.

Quirk v. Thomas (6 Mich. 76), 122.

R.

Railroad Co. v. Schurmeir (7 Wall. 272), 30.

Reynolds v. Mandel (175 Ill. 615), 219.

Reynolds v. Perry (11 Ill. 534), 280.

Rhines v. Phelps (8 Ill. 455), 382.

Rich v. Chicago (59 Ill. 286), 210.

Roberts, In re (24 Fed. 132), 105.

Rodney v. Illinois Central R. R. Co. (19 Ill. 42), 306.

Rohrhof v. Schmidt (218 Ill. 585), 365.

Romaine, In re (23 Cal. 585), 109.

Rose v. Clark (8 Paige, 574), 311.

Rowan v. Kirkpatrick (14 Ill. 1), 260.

Royal Highlanders v. Scoville (66 Neb. 213, 92 N. W. 206), 336.

S.

Schieffelin v. Stewart (1 Johns. Ch. 620), 260.

Schimp v. Cedar Rapids Ins. Co. (124 Ill. 854), 333, 335, 347.

Schlusser v. Grand Lodge (94 Md. 368), 346.

Schmidt v. Supreme Tent K. of M. of the World (97 Wis. 528), 326.

Schunck v. Fond (44 Wis. 374), 347.

Scott v. Flowers (60 Neb. 675, 84 N. W. 81), 506.

Scott v. Lyng (59 Mich. 43), 31.

Scow v. Royal League (223 Ill. 32), 328, 330.

Seaboard Air Line Ry. v. Harris (49 S. E. 703), 516.

Sharp v. Taylor (2 Phillips, Chancery, 801), 119.

Sheen v. Stothart (29 La. Ann. 630), 459.

Shelley's Case, 56.

Shirk v. Gravel Road Co. (110 Ill. 661), 280.

Slebold, Ex parte (100 U. S. 371), 129.

Simpson v. Alexander (10 Ill. 260), 280.

Slaughter House Cases (16 Wall. 36), 78.

Sleight v. People (74 Ill. 47), 469.

Smith, Ex parte (36 S. W. 628, 135 Mo. 223), 129.

Smith v. Chytraus (152 Ill. 664), 280.

Snell, Taylor & Co. v. Pells (113 Ill. 150), 121.

Spencer v. Myers (26 N. Y. S. 371, 73 Hun, 274), 117.

Sprague v. Western Home Ins. Co. (49 Mo. App. 423), 330.

Springer v. Rosette (47 Ill. 223), 371.

Springfield v. Edwards (84 Ill. 626), 372.

Springhead Spinning Co. v. Riley (L. R. 6 Eq. 551), 299.

Stack v. East St. Louis (85 Ill. 377), 81.

Starr v. Peck (1 Hill, 270), 311.
 State v. Corbett (59 Minn. 345), 76.
 State v. Helgen (1 Spear, S. C. 310), 51.
 State v. Jersey City (25 N. J. L. 525), 33.
 State v. Maze & Humphrey, Tenn. 17), 51.
 State v. Meyer (1 Spear, S. C. 305), 51.
 State v. Schlemm (4 Harr. Del. 577), 104.
 Strobe v. Downer (13 Wis. 10), 363.
 Sullivan v. Winthrop (1 Sumner, 1), 260.
 Supervisors of Fulton County v. Mississippi & Wabash R. R. Co. (31 Ill. 338), 238.
 Supreme Lodge v. Davis (58 Pac. Colo. 595), 346.
 Supreme Lodge v. Knight (117 Ind. 489), 338.
 Supreme Lodge v. Kutscher (179 Ill. 340), 330.
 Supreme Lodge v. Meister (105 Ill. App. 477), 346, 347.
 Supreme Lodge v. Moerschbaecher (88 Ill. App. 89), 339.
 Supreme Lodge v. Trebbe (179 Ill. 348), 330.
 Supreme Lodge v. Wellenvoss (119 Fed. 671), 333.
 Supreme Tent v. David (58 Pac. 597), 347.
 Supreme Tent v. Volkert (25 Ind. App. 627, 57 N. E. 203), 323, 346, 347, 348.
 Swann v. Swann (12 Fed. 299), 116.
 Swords v. Edgar (59 N. Y. 28), 33.

T.

Tayler, *In re* (9 Paige, 611), 311.
 Taylor v. Porter (4 Hill, N. Y. 140), 499.
 Tenant v. Elliott (Bos. & P. 3), 120.
 Terwilliger v. Masonic Acc. Ass'n (197 Ill. 9), 347.
 Thielman v. Carr (75 Ill. 385), 228.

Thomas v. Wabash R. R. Co. (40 Fed. 126), 72.
 Thompson v. Sutton (57 Ill. 213), 221.
 Thompson v. Travelers' Ins. Co. (91 N. W. 75, N. D.), 323.
 Thomson v. Thomson (7 Ves. 473), 120.
 Thorne v. Travelers' Ins. Co. (80 Pa. St. 15), 122.
 Tillinghast v. Coggeshall (7 R. I. 383), 56.
 Todd v. Rafferty (39 N. J. Eq. 254), 122.
 Tottleben v. Blankenship (58 Ill. App. 47), 491.
 Trotter v. Grand Lodge, etc. (109 N. W. 1099, Iowa), 346.
 Trustees of Schools, etc. v. Toledo, Wabash & Western Ry. Co. (63 Ill. 299), 473.
 Tyrrell v. Ward (102 Ill. 29), 365.

U.

Union Trust Co. v. Rockford, R. I. & St. L. R. Co. (6 Bias. 197), 98.
 United States v. Dickson (15 Pet. 141), 282.
 United States v. Slaymaker (4 Wash. C. C. 170), 382.

W.

Wall v. Williams (11 Ala. 326), 312.
 Wall v. Williamson (8 Ala. 48), 312.
 Wann v. Kelly (2 McCrary, 630, 5 Fed. 584), 121.
 Ward v. Bliss (198 Ill. 104), 229, 234.
 Ward v. City (169 Ill. 392), 228, 229, 230, 233.
 Ward v. Durham (134 Ill. 195), 361.
 Warren v. King (108 U. S. 389), 43.
 Watertown v. Mayo (109 Mass. 315), 78.
 Watson v. Murray (23 N. J. Eq. 257), 122.

West Chicago Park Board v. McMullen (134 Ill. 170), 81, 465.	Wood v. Penoyre (13 Ves. 326), 260.
Western Union Tel. Co. v. Union Pacific Co. (1 McCrary, 563, 3 Fed. 417), 120.	Wright v. Griffey (147 Ill. 496), 218.
Wharf Case (3 Bland. 361), 33.	Wright v. Stice (173 Ill. 571), 333.
Wheeler v. Smith (9 How. U. S. 55), 498.	Wyckoff, Peter R., In the goods of (3 Sw. & Tr. 20), 378.
Whipple v. Dow (2 Mass. 415), 224.	Y.
Wiggins v. Bisso (92 Tex. 219), 47 S. W. 637), 122.	Yates v. Milwaukee (10 Wall. 497), 30.
Wilkinson v. People (226 Ill. 135), 489.	Z.
Willis v. Henderson (4 Scam. 13), 247.	Zinc Co. v. La Salle (117 Ill. 411), 81.
Wilson v. Pearson (20 Ill. 81), 240.	
Wood v. Mystic Circle (212 Ill. 532), 344.	

CIRCUIT COURTS OF ILLINOIS.

(Circuit Court of Cook County. In Chancery.)

Francis W. Dunbar, et al.

vs.

American Telegraph & Telephone Company, et al.

(1908.)

1. **RES ADJUDICATA—VIEWS OF SUPREME COURT BINDING ON LOWER COURT AFTER REMANDING.** Where a case is reversed and remanded by the supreme court with directions to proceed in conformity with the views expressed in the opinion of the Supreme Court, such views are *res adjudicata* and binding on the lower court as to the law in so far as applicable to the evidence.
2. **CORPORATIONS—POWER TO HOLD STOCK IN OTHER COMPANIES—PURPOSE OF.** If one corporation becomes the purchaser of the stock of another corporation with the unlawful purpose and intention of putting the latter corporation out of business, or so using and controlling it as to prevent rivalry in business and creating a monopoly, such purchase is illegal and void and against the public policy of Illinois.
3. **SAME—PURCHASE IN NAME OF THIRD PERSON.** The legality of the transaction is not aided by making purchase in the name of third persons.
4. **SAME—COMPLETE MONOPOLY NOT NECESSARY.** To invalidate the purchase by one corporation of stock in another corporation for the purpose of suppressing competition or creating a monopoly, it is not essential that a complete monopoly or a complete restraint result. It is sufficient that the tendency be in that direction.
5. **FOREIGN CORPORATIONS—POWERS TO HOLD STOCK IN ILLINOIS COMPANY.** Foreign corporations are subject to all the regulations provided by the laws of the state as to domestic corporations

and consequently cannot purchase or hold stock in domestic corporations where a domestic corporation could not.

6. CORPORATIONS—PURCHASE OF STOCK IN OTHER CORPORATIONS—PURPOSE, NOT MATERIAL WHERE TENDENCY IS TO SUPPRESS COMPETITION, OR CREATE A MONOPOLY. Where the purchase by one corporation of stock in another corporation has a *tendency* to create a monopoly or suppress competition the *purpose* of the purchaser in making the purchase is not material. In other words, it is not necessary in order to invalidate the transaction that the purpose *and* the tendency be the same.
7. MONOPOLIES—POWER TO DISSOLVE COMPETITOR TENDS TO CREATE. Where the purchase by one corporation of the stock of a competitor gives the purchasing corporation absolute control and empowers it to wind up such competitor, the tendency of the transaction to suppress competition and to create a monopoly is apparent.
8. JUDICIAL NOTICE—FACT THAT LARGE CORPORATIONS OR INTERESTS SEEK TO ABSORB OR OVERCOME COMPETITORS. The court should not ignore the well recognized fact throughout the business world that with rare exceptions the persons who control large corporations or business interests are on the lookout continually to absorb or overcome their competitors in trade.
9. CORPORATIONS—ULTRA VIRES—PURCHASE OF STOCK OF DOMESTIC CORPORATION BY FOREIGN CORPORATION. It would seem that under the decisions of the supreme court of Illinois and section 26 of the corporation act that the purchase of the majority of the stock of a domestic corporation by a foreign corporation is *ultra vires*.
10. EQUITY PLEADING—NOT NECESSARY TO ALLEGE TENDENCY OF ACTS CHARGED. When the facts upon which the relief asked is based are alleged in the bill it is not necessary to allege the *tendency* of such acts.
11. CORPORATIONS—SETTING ASIDE PURCHASE BY CORPORATION OF STOCK OF COMPETING CORPORATION—CONDITIONS OF RELIEF. Where the purchase by one corporation of the stock of a competing corporation is set aside, the court should restore, so far as possible, the conditions existing before the time of the purchase. The purchaser should be required to return the stock and the dividends paid thereon with interest on the amount of such dividends. The sellers of the stock should be required to return the purchase price with interest thereon. If the sellers fail to return such purchase price, the stock should be sold and the proceeds to the extent of the original purchase price and interest should be paid to the original purchaser.

Bill, amended and supplemental and cross-bill. The facts are stated in the opinion and in the opinion of the supreme court in the same case, 224 Ill. 9. Heard before Judge Thomas G. Windes.

Henry S. Robbins, for Francis W. Dunbar.

Charles H. Aldrich & Henry S. McAuley, for Kempster B. Miller and George L. Burlingame.

John S. Miller & Pliny B. Smith, for Milo G. Kellogg.

Hon. A. N. Waterman and Holt, Wheeler & Sidley, for American Telephone & Telegraph Co., Western Electric Co. and Enos M. Barton.

Tenney, Coffeen, Harding & Wilkerson, for certain other parties.

WINDES, J.:—

The bill in this case was filed on the fifth of June, 1903, by certain minority stockholders of the Kellogg Switchboard and Supply Company, representing about 370 shares of the stock of the par value of \$100, against the American Telephone and Telegraph Company, a New York corporation, the Western Electric Company, and the Kellogg Switchboard and Supply Company, the latter two being Illinois corporations; also certain officers of these defendant corporations, and the remaining stockholders, as I understand it, of the Kellogg Switchboard and Supply Company, that are not complainants in the case. The court will refer to these three corporations as the American Company, the Western Company, and the Kellogg Company, respectively, so as to save a few words.

Stating the case generally, the principal purpose of the bill was to have declared void and set aside a sale of certain stock of the Kellogg Company by several of its stockholders to a defendant, Mr. Barton, the stock being taken in the names of the defendants Barton and Baker, but taken for the American Company, as I believe is conceded. Certain other specific relief is asked by the bill, beside the setting aside of the contract, and it also asks for general relief. After the filing

of divers demurrers on the part of different defendants, and answers to the original bill, the filing of an amended bill, a supplemental bill and a cross-bill by the defendant, Milo G. Kellogg, and of demurrers and answers and amendments to these answers by different defendants, to the amended and supplemental bill, and the cross-bill, respectively, the demurrers were sustained, and the several bills dismissed for want of equity by decrees entered by Judge Mack some three years and a half ago. These decrees were sustained on appeal to the branch appellate court, but on further appeal the decree dismissing the amended and supplemental bills was reversed by the supreme court, though the court in its opinion says the demurrer is sustained to the original bill, and the cause was remanded with directions to proceed in conformity to the views of the supreme court. The decree dismissing the cross-bill was affirmed by the supreme court. Since that decision of the supreme court the issues were made up on the amended and supplemental bills in conformity to the supreme court decisions, and after the hearing had commenced in the case a further supplemental bill was filed, on which issues were made during the progress of the hearing. To state the details or even the substance of all these pleadings would take unnecessary time, and it would be needless in view of the conclusions that the court has reached. I will endeavor to make it as condensed as I can.

The evidence, which took some four weeks to hear, among other things which the court deems unnecessary to be stated, shows that the Kellogg Company was organized in 1897, and ever since has been operated as a manufacturing corporation, manufacturing telephone switchboards and telephone apparatus in Chicago. It has been a very successful and prosperous corporation, up to the latter part of 1901, when its president, and the active manager of the corporation, the defendant Milo G. Kellogg, who was the owner of a large majority of its stock—as I remember about 3,300 shares of the total of 5,000 shares of the capital stock—was compelled on account of the very extreme ill-health in the latter part of November, 1901,

to leave all business and go to California for an indefinite time, the prospect then being, as is quite clearly shown by the evidence, I think, that he might not be able to resume active business again for a long period, if at all. Mr. Kellogg, on leaving for California, left practically all his private business matters and property in charge of and under the management of the defendant, Wallace L. DeWolf, who is his brother-in-law; and Mr. DeWolf, who was also a stockholder and vice president of the Kellogg Company, then took the active management of that company on the 16th of November, 1901, in place of Mr. Kellogg. Mr. Kellogg was an expert of very long experience in the business of manufacturing telephones and telephone apparatus, and in their installation, and was also a patent expert in the same line. Mr. DeWolf was a lawyer by profession, and had, for quite a number of years prior to this date, and including 1901, been engaged in the real estate business in Chicago, though he was without any practical experience as a manufacturer of, or in the installation of, telephones or telephone apparatus, nor does it appear that he had any experience with patents.

The Kellogg Company, though its business had been quite prosperous, had up to this time paid no dividends, and the management tentatively had arranged a short time prior to Mr. Kellogg's leaving for an increase of its capital stock, and the sale of the same to different stockholders, and I believe some others—I am not sure about that—in order to meet the necessities of the company's then contemplated expansions in its business, as well as its financial difficulties, by reason of the apprehended failure of one of its principal customers, referred to in the evidence and arguments of counsel as the Everett-Moore Syndicate, that Syndicate being then indebted to the Kellogg Company about \$275,000, which was largely in the form of short-time notes that had been discounted at different banks by the Kellogg Company, to the amount of about \$220,000.

Soon after Mr. Kellogg left for California this syndicate failed to meet certain of its discounted notes as they matured,

and they had to be paid by the Kellogg Company. The question then as to the failure of the syndicate at once became very important to the Kellogg Company and Mr. DeWolf, after a suggestion to him of the sale of Mr. Kellogg's stock in the Kellogg Company, and the suggestion of the name of the defendant, Enos M. Barton, as a possible purchaser of that stock, by Leroy D. Kellogg, a son of Milo Kellogg, and after discussing the situation with him—I refer to Leroy D. Kellogg, who was then, too, the secretary and treasurer of the Kellogg Company—commenced negotiations with Mr. Barton for the sale of the stock of his father, in order to raise money to meet the financial situation of the Kellogg Company. These negotiations commenced—it is not definitely fixed when, but I think the preponderance of the evidence is that they commenced at least early in the month of December, 1901, and extended through the remainder of that month, and up to January 4, 1902.

Mr. Barton was then the president and had the active management of the defendant, the Western Company, which was a competitor in business of the Kellogg Company, located in Chicago, and engaged in the manufacture of electrical apparatus and supplies, telephones, telephone apparatus, and their installation, but mainly for the American Company and its licensees or lessee companies. The relations of the American Company and the lessee companies will be more definitely referred to later. It also was then operating a large manufacturing plant in New York, engaged in a similar line of business. The American Company at this time owned and still owns more than sixty per cent of the capital stock of the Western Company, and also a majority of the stock of numerous local telephone corporations in different parts of the United States, as well as a minority of the stock in many other like telephone corporations, throughout the United States, all of which local telephone corporations had licenses from the American Company, and are known throughout this case, in the evidence especially, as licensee or lessee companies. These last named companies constituted a part of the

system of telephone business of the American Company practically, which extends throughout this whole country and is referred to in the evidence and the pleadings, in connection with the American Company and the Western Company, as the "Bell System," the "Bell interests" and the "Bell Telephone Monopoly," though it is quite clear that it is not a complete monopoly.

The American Company at this time had an authorized capital stock of \$150,000,000 and had outstanding stock issued to a very large number of stockholders, to the amount of nearly \$120,000,000. Its authorized capital during the year 1907 was increased to \$250,000,000 and it had stock actually issued during last year to the amount of about \$150,000,000.

The American Company is, and has been ever since its organization, engaged in what is known as long distance telephone service throughout the United States, and in connection with its lessee companies, as well as other telephone companies in no way connected with it, and with the exception of the business done by what are referred to in the pleadings and in the evidence as the Independent telephone companies or system, does all the long distance telephone business in the United States; and it is also referred to in the evidence of its president, the defendant Frederick T. Fish, as a stockholding corporation, evidently because of the large amount of stock that it owns in its licensee companies above referred to.

I think it clearly appears from the preponderance of the evidence that the American Company has a practical monopoly of the telephone business in a very large part of the United States, and its competition with other corporations known as the Independent telephone companies, engaged in that business in many parts of the United States, was at the time of the sale of the stock in question, and for several years before that sale, quite a strenuous competition, and in some instances the witnesses put it as a "bitter" competition. There was such competition between the Bell interests and the independent companies at this time, in the court's opinion, it being estab-

lished by a preponderance of the evidence, as I have stated, and it is practically admitted by some of the defendant's witnesses, Mr. Dommerque, Mr. DeWolf and Mr. Barton; and this competition is also shown by the evidence of the president of the American Company, Mr. Fish, who was called as a witness on behalf of the plaintiffs.

During the whole existence, up to January 4, 1902, of the Kellogg Company, it was the principal manufacturer in the United States of telephones, telephone switchboards and telephone apparatus and supplies for these independent companies. The next largest manufacturer in that line in the United States was a corporation known as the Stromberg-Carlson Telephone Manufacturing Company, and which will be referred to hereafter as the Stromberg-Carlson Company. Another leading manufacturing corporation in that line, in January, 1902, was the American Electric Telephone Company. These three last named corporations were the only ones then manufacturing multiple switchboards for independent companies in the United States, which up to January, 1902, was the principal part of the business of the Kellogg Company. The Western Company at this time was largely engaged in manufacturing for the American Company and its licensee companies. In January, 1902, there were about four thousand telephone operating companies in the United States, and organized in many of the states, into state associations, and there was also a National Association, which included about that number, and they were in no way connected with the Bell interests except their lines in some instances operated together, and these independent companies purchased their supplies largely from the Kellogg Company, and the other two independent manufacturing corporations above referred to. They, including the manufacturing companies, represented an investment in 1902, of about \$150,000,000. In 1907, the number of these independent telephone companies had increased to about seven thousand in the United States, and about that number was included in the National Association of the independent companies. But what their invest-

ment was in 1907 does not appear from the evidence, so far as the court could discover. Divisions 2 to 11, both inclusive, of the complainants' amended bill, show far more specifically in detail by their allegations the nature and extent of the business of the Kellogg Company, the Western Company, the American Company and its lessees, and the independent telephone companies, their relations to each other and the public, and the nature of the competition between the American Company or the Bell System and the independent telephone companies, including the Kellogg Company, up to January, 1902. All of these allegations referred to are, in the opinion of the court, substantially proven by the evidence.

The Everett-Moore Syndicate and the Kellogg Company, through Mr. DeWolf and its attorney, during December, 1901, had considerable negotiations in regard to the payment of the syndicate indebtedness to the Kellogg Company, and efforts to make arrangements by which the Kellogg Company's financial condition on account of this indebtedness would be relieved; but nothing was accomplished by these negotiations. And on January 2, 1902, the failure of this syndicate was publicly announced in the press, and the attorney of the Kellogg Company, who was down East at the time, where these negotiations were progressing, and who then had charge of them on the part of that company, about that date—I don't remember specifically the day on which the notice was given—notified Mr. DeWolf in substance that no arrangements as to the indebtedness of the Syndicate to the Kellogg Company could be made. Then and not until then the negotiations between Mr. DeWolf and Mr. Barton, and Mr. Fish through Mr. Barton, culminated, and resulted in the contract for the sale of the stock in question to Mr. Barton. This contract, omitting the attached statement referred to in it, is as follows: I will not take the time to read that, that is entirely familiar to counsel, and will only refer to certain parts of it.

The evidence shows that the purchase of said stock to the amount of about 4,311 shares was made by Mr. Barton for the American Company, acting through Mr. Barton and its

president, the defendant Fish, and was paid for by the funds of the American Company. The principal question presented is: Was the transaction illegal and void as being *ultra vires*, or against the public policy of Illinois?

The case was remanded by the supreme court, with directions to proceed in conformity with the views expressed by that court, and therefore those views are *res adjudicata* on the law, and binding on this court, in so far as applicable to the evidence in this case. The court says in its opinion, 224 Ill. at p. 22: If the American Company became the purchaser of said stock, with the unlawful purpose and intention of putting the Kellogg Company out of business, or so using and controlling it as to prevent rivalry in business and creating a monopoly, it called for an answer from the defendants. Also, if the American Company had purchased a majority of the capital stock of the Kellogg Company in its own name for the purpose of controlling the latter, and thereby preventing competition between itself and the latter corporation, the transaction would have been one which the courts of this state would not uphold. Citing *People v. Chicago Gas Trust Co.*, 130 Ill. 258, and other cases.

And the court also further held that the purchase by the American Company in the name of another would make the transaction illegal. Also, in commenting on whether the tendency of the purchase would be to suppress competition, it says (p. 23): "while a complete monopoly or a complete restraint of competition would not necessarily result, the tendency would be in that direction, which is sufficient to condemn the transaction as unlawful." Citing the Gas Trust case above referred to, and *Moore v. Bennett*, 140 Ill. 69, known as the Reporters' case. And in reference to the averment of the bill that it was the purpose of the American Company to suppress competition and create a monopoly, it says that it is further aided by the averment as to how Barton was to pay for the stock, and that the business of the Kellogg Company was to be carried on in the usual manner for one year. And further says that, these averments plainly indicate "that a dissolu-

tion of the Kellogg Company was contemplated, because in no other event could the American Company appropriate the assets of the Kellogg Company to pay a stockholder of that company for the stock purchased by the former company from him." And says that the court had reached the conclusion—I quote the exact language: "that the purpose and tendency of the purchase by the American Company are sufficiently shown by the bill to be to suppress competition by that company in telephone service to the public and create in the American Company a monopoly of that business."

Further, in speaking of the American Company being a foreign corporation, the court held that it is subject to all the rules and regulations provided by the laws of this state, citing a number of cases, and the 26th section of the Corporation Act which so far as material here is as follows: "Foreign corporations, and the officers and agents thereof doing business in this state, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers." The court, speaking of the power of the American Company to purchase a majority of the stock of the Kellogg Company for the purpose of controlling it, held that it could not do it, and said—This is the direct language of the court: "To permit it to do so would be against the law of this state and its public policy."

It makes no difference now that the evidence shows that the American Company also purchased stock of another corporation, since under the Illinois statute, and the supreme court decisions, an Illinois corporation cannot purchase stock under the circumstances attending this purchase. And that, the court is of opinion, is fairly established by the *Gas Trust Case*, and others following since that, especially the *Glucose Case* in the 182nd Ill., I think the decision is reported in (*Harding v. American Glucose Co.*, 182 Ill. 551)

The language of the supreme court, by the use of the words "purpose and tendency" conjunctively, in several instances

which the court has referred to, and in others not referred to, when speaking of a question as to whether the purchase of the stock would have the effect of suppressing competition or creating a monopoly, would seem to indicate that "purpose" in that regard on the part of the purchaser should be shown in order to make the contract illegal. This court is, however, of opinion, that such was not intended to be the ruling of the supreme court, for it, in effect, says, on page 23 of the opinion, that "tendency to create a monopoly or restrain competition is sufficient to condemn the transaction as unlawful." And that is the holding of the supreme court in the *Gas Trust Case*, *Moore v. Bennett*, *Harding v. The American Glucose Company*, 182 Ill. 551, at pages 617 to 620, and the cases there cited. This court considers this ruling as *res adjudicata* as to the law of the case. And if it can be said that the contract, considering the circumstances under which it was made, had a tendency to suppress competition, or create a monopoly, it is void as against public policy. The allegations of the bill the court has referred to, regarding the circumstances under which the contract was made, being substantially proven, it follows that the supreme court's ruling must control in the decision of this case on this point.

The fact that the purchase gave the American Company the absolute control of the Kellogg Company, enabled it to prevent the selling of supplies by the Kellogg Company to independent telephone companies, to stop the business of the Kellogg Company, or even to dissolve the Kellogg Company, shows a natural and reasonable tendency to suppress competition and create a monopoly; though it is but just to the defendants in this connection to say that the Kellogg Company did not cease its sale of supplies to the independent companies, nor did it stop its business, and it has not been dissolved, but it has paid a dividend since this sale, upon its stock, of fifty per cent. The court thinks there was a very wise and prudent conduct and management of the business of the Kellogg Company to avoid any evidence, so far as it possibly could, which would tend to establish the tendency of such a contract.

If the court, however, is wrong as to the scope of the supreme court decision in this regard, and that it is necessary that there should be shown purpose on the part of the purchaser of this stock, in order to make the contract illegal, that is, a purpose to suppress competition, or create a monopoly, the court is of opinion that the preponderance of the evidence shows such purpose on the part of the American Company. To review this evidence would require very much time, and it seems sufficient to make reference to the proof in a general way. The fact that there was a serious competition between the American Company, its lessee companies, and the Western Company, known as the Bell System, on the one part, and the independent telephone companies, of which the Kellogg Company was one of the principal independent manufacturing companies in the United States on the other part, when the nature and extent of the business of all these companies, as alleged in divisions 2 to 11, inclusive of the amended bill, and which have been substantially proven as heretofore stated by the court, are considered in connection with the terms of the contract of purchase, and the circumstances shown by the evidence as existing during the negotiations leading up to the purchase, especially the seriously involved financial condition of the Kellogg Company, and Milo G. Kellogg, his past activity in the Independent Telephone Movement for more than five years prior thereto, his opposition generally to the Bell System in his business and in the business of the Kellogg Company, the strong probability that this activity would not commence again for a long period, if at all, because of his bad state of health; that Mr. DeWolf was to be in charge of the Kellogg Company and had very friendly business relations with Mr. Barton and the Western Company; that the Everett-Moore syndicate, which was also on the verge of failure and largely indebted to the Kellogg Company, was a large independent telephone organization, which, if successful in its line of business would prove a strong competitor of the Bell interests; all of which matters are clearly established by the evidence—there seems to have been ample reason for saying there was a purpose on the part of the

American Company to place itself in a position, by this purchase, to suppress competition and build up a monopoly.

Also in addition to these matters, the court should not ignore the well recognized fact throughout the business world that with rare exceptions, the leading characters to which the court will omit names, who control large corporations or business interests are on the lookout continually by some means, whether direct or indirect, to absorb or overcome their competitors in trade. When this natural tendency of human nature is considered with all the other matters referred to, the conclusion as to purpose seems to the court a reasonable one, to use a mild term, notwithstanding the evidence as to the intention of the purchase by Mr. Barton and Mr. Fish to the contrary, and also notwithstanding the very exhaustive and able arguments of defendants' counsel.

Very soon after January, 1902, more than a year before the purchase was known to the public, of the making of the contract of purchase of the stock, the evidence shows that there was an effort by Mr. DeWolf and Mr. Barton to buy out the Stromberg-Carlson Company, the next largest independent manufacturing company of telephone apparatus, to the Kellogg Company; or, to put it more mildly, negotiations to purchase were started during the month of January, 1902, or about that time, though nothing was accomplished. That is a strong item of evidence in the court's opinion, tending to show a general purpose to suppress competition and get control of the then largest independent telephone manufacturing companies for the purpose of promoting a monopoly. Considerable evidence was also presented to the court of like efforts on the part of the American Company to make similar purchases as late as 1907, but the court regards it as quite remote in point of time, questions the competency of this evidence, and has therefore not considered it in reaching its conclusion on the matter of purpose of the American Company in making the purchase of the stock in question.

The court is of opinion that the contract, therefore, is void as against public policy of the state of Illinois, because the

preponderance of the evidence shows a purpose to suppress competition and create a monopoly in the line of business of the Bell System, though not a complete monopoly. And this purpose is in addition to the tendency of the contract to the same effect as has been stated by the court. In view of these conclusions, it seems to the court unnecessary to discuss the question of whether the contract was *ultra vires*, though that would seem, under the evidence and the rulings of the supreme court, under our statute—section 26 of the corporation act which has been quoted—to be settled in the affirmative.

A great mass of evidence was offered and admitted, subject to objection, by the court, both on behalf of the complainants and the defendants, regarding the manner in which the business of the Kellogg Company has been conducted since the purchase by the American Company of its stock; the extent of that business; its profits; the increase and decrease of certain parts of its business; as to certain patent suits between the Kellogg Company and its customers on the one part, and the Bell interests on the other part, both before and after the purchase of the stock; as to the foreign business done by the Kellogg Company both before and after the purchase, within the past two years mainly; also the purchase by leading employees of the Kellogg Company of the Western Company's stock, the Kellogg Company loaning them more than \$57,000 in order to enable the employees to make their purchases; and negotiations between Mr. DeWolf and one Judge Thomas, in regard to the Kellogg Company entering into a combination with certain independent telephone companies; all of which it is claimed has a bearing on the question of purpose and intention of the American Company in making the purchase of the Kellogg Company's stock. The court had some doubt as to the competency of all this evidence, because a great deal of it was with regard to matters quite remote from the transaction in question and not necessarily having any bearing upon it. It may be that many of the things shown were done because of purposes or intentions formed after the purchase of the stock in question; and if so, they would have no bear-

ing on the transaction. And for that reason, namely, that it was not necessary to the result reached by the court as to the tendency of the purchase, to consider purpose and intention, the court has not considered the items of evidence last above referred to, as should have been done had the court thought that the decision of the case depended wholly upon the purpose or intention of the American Company in making the purchase. It is contended by defendants' counsel that the amended bill contains no allegation as to tendency, and therefore that no relief can be granted under the pleadings. This contention, in the court's view, is not tenable, for the reason that as has been stated, facts are alleged which the court is of opinion clearly show the tendency of the purchase, and it was so decided by the supreme court.

It was contended by defendants' counsel that allegations of the amended bill, in effect, charge the commission of a crime on the part of the defendants, and therefore that the allegations of the bill must be proven beyond all reasonable doubt, before any relief could be based thereon. It is unnecessary to pass upon this point, for the reason that the court's ruling is as to the tendency and purpose of the purchase, and that does not amount to a crime, but only shows that the transaction is void as against public policy.

The court on the hearing took notes of the evidence and arguments of counsel, in an abbreviated form, which if written out would make about 125 typewritten pages, all of which it has carefully considered since the arguments closed, and it has also read such parts of the pleadings and evidence as were necessary to refresh its recollection. Reference has not been made to many points of the arguments of counsel, nor to the details of the evidence, but all have been carefully considered, and the conclusions reached thereafter. The court makes this statement to assure counsel that the importance of the case has been appreciated, and nothing presented has failed to receive the consideration of the court by reason of carelessness or willful negligence.

The transaction in question being void, if the court is right

in its ruling in that regard, it follows that no title to the stock passed, and Milo G. Kellogg and the other sellers of stock under the Barton contract are still the owners of the stock under the law. The decision of the supreme court controls as to Milo G. Kellogg's rights to any relief under the cross-bill, it being based upon alleged fraud, and there was no offer in the cross-bill to place the purchaser in *statu quo*. It is true, the court says: "The contract is not void, but only voidable at the election of the defrauded party." But this must be construed with reference to the relief asked in the cross-bill being based upon alleged fraud, and has no bearing on the complainants' rights under the amended bill, which depend upon the situation as to them. The supreme court holds, on page 26 of the opinion that the invalidity of the purchase is sufficient to entitle complainants, as minority stockholders, to have the American Company restrained from voting the stock purchased by it, and thus controlling the Kellogg Company. This right of complainants exists, notwithstanding the adjudication of the supreme court on the cross-bill, based on its allegations of fraud in bringing about the purchase. If the transaction between the American Company and Milo G. Kellogg and other sellers of the stock is void as held, the complainants are entitled to relief that should be granted on the basis of their equities, although the result may indirectly be a benefit to Milo G. Kellogg and other sellers of stock and an injury to the American Company. Complainants' relief should not be limited on this account, but should be granted on such conditions as will cause the least injury to the parties concerned in the transaction and at the same time give them their equitable rights. To protect the complainants and do equity to them, they are entitled to have restored, so far as possible, the situation as it was before the purchase of the stock, and in so far as a change has resulted from that sale. This can be accomplished by requiring the American Company to bring the stock in question into court, together with all dividends paid thereon, with interest at five per cent per annum from the times of payments respectively of such divi-

dends, and the return of the stock to Milo G. Kellogg and to others that sold to the American Company under the Barton contract, upon their paying to the American Company the prices paid them for this stock, with interest at five per cent per annum from the times when said payments, respectively, were made to them. In case the sellers, or either of them, should fail to make return of the purchase prices of stock with interest as stated, within thirty days from the entry of the decree, then the decree should provide that the stock be sold under the direction of the court, say one-half cash, and balance in six months from sale, with interest at five per cent per annum, such balance to be secured by a deposit of the stock with the clerk of this court as security. Pending the making of such payments the business of the Kellogg Company should be conducted by the present administration of that company, or its president should act as a receiver of the court, of course giving large and ample bond, which I think in this case should not be less than \$100,000; and the annual meeting of the stockholders should be adjourned under the terms of the decree of the court until said payments are made, or, in default thereof, until a sale of said stock shall be made and perfected, as indicated.

In case of failure of any seller of the stock to pay the purchase price of his stock to the American Company within thirty days from the entry of the decree, then the proceeds of the sale of that specific stock should be paid to the American Company to the extent of the purchase price paid by it for such stock, and interest at five per cent. per annum from the dates at which the American Company paid such seller for such stock. If there should be any surplus on the sale of the stock over said price paid by the American Company and interest, it should be paid to the seller of said stock—I refer, by the seller, to the American Company, under the Barton contract,—said dividends and interest thereon, as if paid into court, should be paid over to the seller of said stock, after deducting therefrom any deficit from the purchase price of said stock, as paid by the American Company, and interest

thereon, which may result from the sale of the stock, under the order of the court.

The court is inclined to the view that the facts alleged in the amended and supplemental bill and as has been stated were proven, and the fact that the bill has a prayer for general relief, would justify a decree as indicated, except as to the receiver, which is suggested, not because there seems to be an absolute necessity for one, but to avoid, so far as possible, any friction that may arise, pending a closing up of the decree, or pending an appeal, which may be taken from this court, as has already been suggested by counsel on both sides. If the complainants desire a receiver, the court is of opinion there should be an amendment to the pleadings, and perhaps additional proof even, which would be justified because of the injunction which has already been granted temporarily, and the apparent financial responsibility of the parties in control of the Kellogg Company, and especially in view of the financial success of that company since it has been under their control.

One part of my notes I failed to give, and that is this: The American Company and its representatives should by the decree, and pending its accomplishment, be enjoined from in any manner interfering with the management or conduct of the business of the Kellogg Company, and the temporary injunction, granted February 13, 1907, should be made final, except as in some of its provisions it may conflict with the decree here indicated by the court.

If a decree is to be entered on the pleadings, as they now are, it may be drafted, declaring the sale of the stock void, as against the public policy of this state, and setting it aside; and also in accord with the court's rulings, as has been indicated, omitting the receiver. If counsel for defendants, they having declined in the oral argument to discuss any decree except one denying complainants any relief, are of opinion that the decree directed by the court is not proper, under the court's rulings, and in view of the evidence and the pleadings, the court will consider anything they desire to say on that

subject at the criminal court next Tuesday morning at 8:45. If counsel cannot present their views, if they desire to present any on that point, why then they can prepare a brief in three days on the question of the form of the decree only.

(Circuit Court of Cook County. In Chancery.)

The South Shore Transportation Co., et al.

vs.

**The World's Columbian Exposition, the World's Fair
Steamship Co., et al.**

(1893.)

1. **PUBLIC PARKS—OPEN ON SUNDAY WHERE USED AS EXPOSITION—RIGHT OF TAXPAYER.** Where a public park is used as an exposition by authority of the legislature a taxpayer is not entitled to have the exposition remain open on Sunday for the reason that it is located in a public park. The remedy of such taxpayer is to challenge the power of the legislature to surrender the use of a public park for exposition purposes.
2. **TAXPAYER—RIGHT TO PREVENT BY INJUNCTION MISAPPROPRIATION OR DIVERSION OF PUBLIC PROPERTY IN ABSENCE OF SPECIAL DAMAGE.** A citizen or taxpayer who suffers no special damage or injury different from the public at large by reason of the misappropriation or diversion of public property cannot maintain a bill in his own name for an injunction to prevent the same. Such a bill must be brought by the attorney general.
3. **SAME—RIGHT TO PREVENT DIVERSION OR MISAPPROPRIATION OF PUBLIC PROPERTY BY INJUNCTION—LACHES.** Where a public park is appropriated by the legislature for the purposes of an exposition a taxpayer cannot question the right of the legislature so to do where action is not taken until a large sum of money has been expended on such exposition. The complainant is barred by *laches*.
4. **PUBLIC PROPERTY—CESSION TO UNITED STATES.** Where public park property is ceded by the state to a commission appointed by the United States for the purpose of an exposition it is doubtful whether the courts of the state have power to interfere with such property.
5. **UNITED STATES—OFFICERS OF—POWER OF STATE OVER.** A state court has no power to interfere with officers of the United

States in the discharge of duties imposed upon them by act of congress.

6. **EQUITY—RELIEF IN—COMPLAINANT MUST DO EQUITY.** Where the United States donates a sum of money to an exposition on the condition that such exposition remain closed on Sunday, a taxpayer cannot compel the keeping open of such exposition on Sunday without offering to return the amount of the donation. A court of conscience should also be a court of honor.
7. **RIPARIAN RIGHTS—BUILDING PIERS AND WHARVES.** The right to build wharves and piers in navigable waters as appurtenant or incident to the ownership of the adjoining land, is a riparian right.
8. **SAME—DEPENDENT UPON TITLE TO BANK.** Riparian rights are dependent upon the title to the bank and not upon the title to the bed of the lake or stream in front of the bank.
9. **SAME—WHERE THERE IS EBB AND FLOW OF TIDE.** There is no difference between the rights of a riparian proprietor's bordering a navigable stream whether the waters be inland rivers or have the ebb and flow of the tide.
10. **LAKE MICHIGAN—RIPARIAN RIGHTS IN.** Riparian proprietors on Lake Michigan have the right to build piers, wharves and landings for their own exclusive use and enjoyment.¹
11. **WHARVES—WHETHER PUBLIC WHEN BUILT IN CONNECTION WITH PUBLIC PROPERTY.** Where wharves are built by the public authorities in connection with public property or as an extension of a public street, they do not thus become public wharves open to indiscriminate use.
12. **WATERS—WHETHER RIPARIAN OWNER CAN EXTEND HIS STRUCTURE BEYOND THE POINT OF NAVIGATION.** A riparian or littoral owner must not extend his pier or wharf beyond the line of navigability. He is not required, however, to stop at the exact point where navigation begins, but as such structures are permissible only in aid of navigation they may extend as far as necessary for the purposes intended.¹
13. **PUBLIC NUISANCE—RIGHT OF INDIVIDUALS TO REDRESS.** Individuals who sustain no private injury are not entitled to redress against a public nuisance. Only the attorney general can take action.
14. **MONOPOLIES—WHAT CONSTITUTES.** It does not constitute a monopoly for an owner of a private wharf to give an individual an exclusive right to run a line of steamers from or to such wharf.
15. **WHARVES—WHETHER PUBLIC OR PRIVATE.** Wharves, docks or landing places may be private or public, depending upon the purpose for which the same are built, the uses to which applied,

¹ But see 202 Ill. 427, 177 Ill. 468.—Ed.

the place where located and the nature and character of the structure.

16. **SAME—WHETHER AFFECTED WITH PUBLIC USE.** When a private wharf is thrown open to the use of the public it becomes affected with a public use and must be open to all upon the same terms and conditions.
17. **SAME—DISCRIMINATION AGAINST PARTICULAR PORTS AND VESSELS IN USE OF.** Where the owner of a wharf permits its use to one steamship line generally but denies the use of such wharf to vessels from particular ports, such discrimination is illegal and tends to obstruct commerce. There can be no discrimination between different members of the public or between vessels from different ports.
18. **PUBLIC USE—RIGHT TO ABANDON.** Where a pier has for a long time been used as a public landing place the owner of the pier has a right to discontinue its use for that purpose. It does not follow that because the public was permitted to use it that the public has the right to use it forever.

Bill for injunction. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

TULEY, J.:—

The main complainant in this case is an Illinois corporation, owning a number of vessels engaged in carrying passengers from the city to the different public parks and other points of interest. There are three citizens owning vessels joined with the corporation as complainants. Some of the complainants are alleged to be taxpayers in South Chicago.

In 1869, under legislative act, Jackson Park was established as a public park, was paid for and is still maintained by taxation of the towns of South Chicago, Hyde Park and Lake, now a part of the city of Chicago. The park was established as a public park for the recreation, etc., of the public, and declared to be "free to all *persons forever*."

A part of section 15, town 39 north, range 14, extending along the lake shore in the heart of the city was dedicated by the commissioners of the Illinois & Michigan Canal, originally as "Michigan Avenue," a street of irregular width, having for about a half a mile frontage on the shore of Lake Michigan as its eastern boundary. This part of Michigan avenue

next to the lake shore and next to the Illinois Central Railroad right of way, became known and was recognized by the state legislature as "Lake Park."

Subsequently, in 1850, the Illinois Central Railroad was granted by the state a right of way 200 feet in width and Chicago was made one of its terminals. The railroad had the right to lay its tracks within the city upon such terms as it might agree upon with the city council. An ordinance was passed by which the city consented to the railroad laying and locating its right of way along the lake shore in front of section 15, at a distance of 400 feet east of the west line of Michigan avenue. Among other terms and conditions of the ordinance was a provision that the railroad should build and maintain a stone pier work at a distance of 300 feet east of and parallel with said 400 foot line. The ordinance was accepted and the pier built. In the course of a few years the space between Michigan avenue (which had been narrowed to 100 feet) and the right of way of the railroad became filled with debris from the city, and became a common or park of about 22 acres known as Lake Park. Afterwards, and in 1869, the state legislature attempted to grant the railroad all the submerged lands in front of Lake Park which it is alleged by the recent decision of the United States supreme court,¹ only amounted to a license to improve the harbor of the city, which license has been subsequently revoked by the state; that the United States several years ago constructed a harbor of refuge for vessels in front of said Lake Park, and it is alleged that the shores, wharves and landings at said Lake Park have been since used for interstate and foreign commerce; and that among the vessels so using the same were those of the complainants; that the waters in front of Jackson Park are navigable waters and that the park commissioners some years ago erected landing places which were used by complainants' vessels and others to land passengers visiting said Jackson Park.

In 1890 the congress of the United States passed an act to

¹ *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387.—Ed.

provide for celebrating the 400th anniversary of the discovery of America by Columbus by holding an international exhibition of art, industries, etc., at Chicago; that the act of Congress provided for the appointment of United States commissioners, to be known as the "World's Columbian Commission," with power to determine the plan and scope of the exposition, award premiums, etc., and to accept, in its discretion, such sites and plans, etc., for buildings (to be erected by and at the expense of) as might be tendered by the "Worlds' Columbian Exposition Co." a corporation organized under the laws of Illinois; and that the plans for and the rules and regulations of the Illinois corporation for entrance fees, or otherwise affecting the rights, etc., of exhibitors or of the public, should be subject to such modifications as the United States commission should impose.

The World's Columbian Exposition Co. was organized for the purpose of promoting and carrying on the World's Fair or Exposition, and in 1890 the Illinois legislature passed an act¹ granting "to the authorities having the charge and management of said World's Columbian Exposition" "the use and occupation of all lands or right therein of the state of Illinois, whether submerged or otherwise, within the present limits of the city of Chicago or adjacent thereto, which may be designated and selected by said authorities as the site or sites for the holding of said World's Columbian Exposition," and the use and enjoyment, with the consent of the city, of any public or park grounds, and rights appurtenant thereto, the title or control of which was in the city, with "authority to improve the same * * * in such manner as to said authorities" should seem necessary or expedient, and in case any public park should be selected for a site or sites, for such exposition, authority was granted to its park commissioners to allow the use of the same for the purposes of the exposition, on such terms and conditions as might be agreed upon between the park commissioners and said authorities; that the Exposition Co. tendered to the U. S. Columbian Commission,

¹ Sess. Laws of Ill. 1890, pp. 5, 6.—Ed.

Jackson Park and Lake Park as sites for the exposition and the same were accepted; that in September, 1890, the city council, by ordinance, did grant to the Exposition Co. authority to take possession of and control and exercise all the jurisdiction the city possessed over Lake Park and its appurtenances, to be used exclusively for the purposes of the exposition or fair, which ordinance was to be accepted in 30 days or to be null and void. The ordinance was not formally accepted, but was acted upon as if accepted; that the commissioners of South Park and the directors of the Exposition Co. had agreed upon terms for the use of said Jackson Park for the purposes of the exposition.

It is alleged that in June, 1892, the directors of the Exposition Co. made a concession or contract with Stone and others, who acted for and who were given power to assign the same to a corporation known as the World's Fair Steamship Company, whereby the Steamship Company was given the exclusive right and privilege to transport passengers by water to and from the World's Fair or Exposition grounds, and to and from all points between the city of Kenosha,—50 miles from Chicago,—on the north and East Chicago Harbor on the south, and to make the privilege more valuable, agreed that the Exposition Co. would not allow vessels, or passengers from the same, from said points and points between, and the Exposition grounds to land at any pier or piers at the Fair grounds, saving only the boats (and passengers thereon) of said Steamship Co. and that no gate or entrance should be established on the north side of said grounds, if any pier or landing place should be established or built within 3,000 feet of the north line of the fair grounds at Jackson Park, nor any gate on the south side of said fair grounds; that by said contract the Exposition Co. agreed to build at Jackson Park and at Lake Park piers with not less than 2,000 feet frontage and to cause to be constructed over the Illinois Central Railroad tracks a viaduct to the pier at Lake Park; that the pier at Lake Park should not be used for any other purpose than the business of the Steamship Co., but the Exposition Co. re-

served the right for the landing and embarkation of passengers at Jackson Park from vessels coming from points outside of said limits, Kenosha on the north and East Chicago Harbor on the south, but such use should not interfere with the Steamship Co.'s business or use of such pier; the Steamship Co. agreeing to put into service vessels with capacity to carry 15,000 passengers an hour, not to charge more than 25 cents for the round or 15 cents for a single trip, between Lake Park and Jackson Park; to police the piers, etc., and to pay the Exposition Co. 20 per cent. of the gross receipts; that piers extending into the lake a distance of 1,000 feet have been built at Lake Park and at Jackson Park; that the directors of the Exposition Co. threaten to make such rules and regulations as may be necessary to carry out said agreement and to prevent complainants from landing at, or receiving and discharging passengers at said wharves or piers or at the landings at Jackson Park constructed by said park commissioners, although complainants are willing to pay such tolls or fees as may be charged to other vessels.

An amendment to the bill sets out the passage of an act of congress in 1892 appropriating two and one-half millions of dollars for the World's Fair on condition that the fair should be closed upon Sundays, and making it the duty of the United States Commission to see that the proper rules and regulations are made for that purpose.

The relief prayed is for an injunction restraining the directors of the Exposition Co. from closing the gates of the fair on Sunday; also to enjoin the Exposition from discriminating against complainants as to landing at and receiving passengers to and off said piers or wharves from complainants' vessel; also from refusing to permit such passengers to land on said piers and enter said Jackson Park on the same terms as the vessels and passengers from other boats are permitted so to do; and from carrying out said contract with the Steamship Co. or according to said Company or its vessels any rights or privileges not accorded to complainants and their vessels.

The only defendants served with process are the Exposition Co. and the Steamship Co. The former has demurred to the bill, and the latter has filed an answer. A number of affidavits in support of the answer and of the bill have been read. The averments of the bill as to the laws and ordinances set out are admitted, as is also the contract with the Steamship Co., which is defended upon the ground that it is lawful and for the best interest of the fair and of the public.

It appears from the affidavits that heretofore there has been no wharf or dock at Lake Park, but that the complainants and others have used the pier of the Illinois Central Railroad as such and have carried passengers therefrom to a small pier built by the Park Commissioners at Jackson Park, and to other places.

THE SUNDAY QUESTION.

The complainants insist they have the right to an injunction against closing the exposition upon Sundays because Jackson Park was created and dedicated by the general assembly of Illinois and paid for by the taxation of property in South Chicago, Hyde Park and Lake, as "a public park for the recreation, etc., of the public and free to all persons forever;" that it was beyond the power of the state legislature or the park commissioners to pass any act or ordinance closing the park on Sunday, or any other day.

If a bill had been filed in apt time by a complainant having the right to challenge the power of the state legislature to surrender this public park to the World's Exposition purposes, it would have presented a very serious constitutional questions. The complainants cannot now raise it for the following reasons:

1st. That the law is well settled that a citizen or taxpayer who suffers no peculiar damage or injury different from that of the public at large, by reason of the misappropriation or diversion of public property, such as a street or commons, can not maintain a bill in his own name for an injunction to prevent the same, but such a bill must be brought by the

attorney general as representing the public at large. The case of *City of Chicago v. The Union Building Association*, 102 Ill. 379, is directly in point. There a property owner on La Salle street filed a bill to restrain the closing up of La Salle street, where the present board of trade stands, alleging that his property had been largely assessed for, and had paid for opening La Salle street at the point where the city council proposed to vacate and close it, but the supreme court held that such a bill could not be brought except by the attorney general. In this case these complainants suffer no other or different injury than other citizens or tax payers suffer, the injury being common to all alike, and the attorney general only can represent the public.

2nd. Even if the bill would lie by these complainants, it is not brought in apt time so far as this question is concerned, as they would not be allowed to lie still until twenty million dollars have been expended, and then question the right to appropriate the park to the purposes of the fair. The state having authorized the "authorities having in charge the World's Columbian Exposition" to take possession of Jackson Park and use it for the World's Fair, it is certainly a debatable question whether or not the jurisdiction over the park has not been ceded to the United States for the World's Fair purposes. The cession is to the authorities having in charge "the World's Exposition." The United States, by its "World's Columbian Commission" accepted the sites. The "Commission" by the act of congress is given large independent powers and a supervising power over the acts of the Illinois corporation. The act of congress created the fair and made it an "international exposition" and located it on sites determined by its own "Commission."

It is true that the United States graciously permitted the Illinois corporation to raise the money and pay all the expenses, but that does not make it any the less an "International Exposition" under the control of the United States government. The United States did make a donation of two and one half millions of dollars (it seems like sarcasm to call

it a donation) on condition that the fair be closed upon Sundays. It, by the same act, directed its "Commission" to see that the requirement as to closing the fair upon Sunday was complied with.

It is also a serious question as to whether the state courts have any jurisdiction or power to interfere with the acts of this "Commission." The "Commission" is a United States agency and its officers may be said to be—as to the fair—*pro hac vice* officers of the United States. It is a general rule that a state court has no power to interfere with the United States officers in the discharge of duties imposed upon them by an act of congress.

The bill is deficient in another respect in that it asks the court to enjoin the closing of the fair upon Sundays without requiring the return to the United States treasury of the two and one-half million dollars donation. This would not be honest. A court of conscience should be also a court of honor.

The proper parties, neither complainants nor defendants, are before this court so as to enable it to pass upon the right to close the fair upon Sundays.

AS TO THE PIERS AND WHARVES.

Admitting that in the act referred to, the legislature, by the words "the authorities having in charge" the World's Fair intended to make the grant to the corporation "The World's Columbian Exposition," then that corporation has become vested with the use and occupation and with all the right, title and interest of the state, and of the city of Chicago, in Lake Park, its appurtenances and the submerged land in front of the Park, with "the right and authority to improve the same for the purpose of the World's Exposition in such manner * * * as should seem necessary or expedient."

By the same act and the ordinance of the South Park Commissioners the Exposition Co. became vested with all the power, for World's Fair purposes, over Jackson Park that the commissioners could confer. But the parks being upon

the banks of Lake Michigan, the Exposition Co. became vested, temporarily, with all the rights of a riparian proprietor.

The right to build out piers or wharves into public or navigable waters as appurtenant or incident to the ownership of the adjoining land is a riparian right. This riparian right is dependent upon the title to the bank and not upon the title to the bed of the lake, in front of the bank. *Dutton v. Strong*, 1 Black, 23; *Railroad v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Ensminger v. People*, 47 Ill. 384; *City v. Lafflin*, 49 Ill. 172; Gould, Law of Waters, sec. 148, and cases cited.

If I understand the senior counsel for complainant, he contends that there can be no private piers or wharves upon Lake Michigan or upon navigable waters where there is an ebb and flow of the tide, whatever right there may be to build such upon navigable rivers and interior small lakes. The case in 7 Wallace, 272, *ante*, decides that there is no difference between the rights of a riparian proprietor's bordering navigable waters in this country, whether the waters be inland rivers or have the ebb and flow of the tide. Nor is it true that there can be no private piers or wharves upon navigable waters where there is an ebb and flow of the tide. The right is a common law right as incident to the ownership of the bank. *Lyon v. Fishmonger's Company*, L. R. 1 App. Cas. (1876) 662.

In *Dutton v. Strong*, *ante*, the question arose as to the right to build out into Lake Michigan a private wharf and the court held that "undoubtedly, a riparian proprietor may construct a pier, wharf or landing place for his own exclusive use and enjoyment," and "may have the right to exclude all other persons from its use."

It is contended that these wharves being built in front of public parks, they became a part of the public parks and must be, as those are, common to everybody; that the wharves are mere extensions of the public grounds. This precise question arose in a Detroit case. The city of Detroit having

authority by its charter to build public wharves and lease the same, built one at the end of a street and leased it to a private party. It was contended, as here, that the wharf was merely an extension of the public ground or street and was therefore open to the use of the public. The court held: (Syllabus.)

"The wharves in the city of Detroit, whether terminating highways or not, are not highways, but are private property, and where they are owned by the city, may be leased like other corporate property to private lessees. The title is proprietary, and not a public easement."

That the term "public wharf" did not mean that it was dedicated to public use like a highway, and meant only that it belonged to the city, "and that such wharves are not open to indiscriminate use." *Horn v. People*, 26 Mich. 221. See, also, *Backus v. Detroit*, 49 Mich. 110; *Scott v. Lyng*, 59 Mich. 43.

These cases hold that a municipal corporation may exercise the same rights as to streets terminating at the water's edge to build wharves and piers out to navigable waters, that an individual riparian proprietor has to build in front of his own land and that such wharves are not necessarily public wharves. The reasoning of those cases commend them to my judgment and induce me to follow them as good law.

Independent of the right of the Exposition Co. as riparian owner (for the time of the fair) to build such wharves, there is another ground upon which the Exposition Co.'s right to build such wharves and to enter into the contract for the putting on and running a line of steamers from Lake Park wharf to the Jackson Park wharf, can be sustained. It has not only the right to improve the submerged land as it should deem necessary or expedient, but it has the right to do any and every thing that may be necessary to promote the interests of and make the World's Fair a success.

It appears that both Lake Park and Jackson Park—distant from each other about eight miles—have been selected as sites for the World's Fair. Upon Lake Park is the Art Exposition and the remainder of the fair is at Jackson Park.

The Exposition Co., under the broad powers given it, if it deemed it necessary for the public interest and the success of the fair, could build these piers or wharves and itself or by its agents could put on a line of steamers and boats to transport passengers between the fair grounds at Lake Park and the fair grounds at Jackson Park. The doing so would be no more an interference with complainant's rights to navigate the lake and carry passengers to and from the parks, than it would be an interference with the Illinois Central Railroad's right to carry visitors to and from the fair if the exposition having a right of way should build a railroad of its own between the two parks.

It is contended by complainants that the piers or wharves in question, being one thousand feet in length, extend beyond the point of navigability and so far as they extend beyond such point, become common property, open to the use of all vessels and persons.

The general rule undoubtedly is that a riparian or littoral owner must not extend his pier or wharf beyond the line of navigability. By this it is not meant that he must stop at the exact point where navigation begins, but as such structures are permissible only in aid of navigation, they may extend as far as necessary for the purposes intended. "To reach navigable water," says Chief Justice Ryan, "necessarily implies reaching it with effect" and necessarily implies "some intrusion into navigable water and the peril of obstructing navigation." If such structures extend too far and obstruct navigation, they become a common or public nuisance, but the rule is that individuals are not entitled to redress against a public nuisance. By the building or too great extension of these piers there is no injury peculiar to complainants and different from that suffered by the public at large. Unless he sustains a private injury, he cannot maintain an action to remove the public nuisance, nor abate the same, nor can he appropriate such structure or materials composing the same to his own use. Gould, Law of Waters, sec. 128 and cases cited. I am not prepared to say that the

wharves in question, considering the purpose for which they are built, extend beyond a point necessary and justifiable. It is sufficient, however, to say that only the state, by its attorney general, can raise that question.

AS TO MONOPOLY AND DISCRIMINATION.

The building of the wharves and the running of a line of steamers between them, carrying passengers, no more constitutes a monopoly than would it be a monopoly for an individual to run a line of steamships between his private wharf in the Chicago river and his private wharf in Buffalo or other point; nor can it be said to be any discrimination between vessels or persons so long as no other vessels than those of the Steamship Co. use the wharves in question.

PUBLIC WHARVES.

The same authority, *Dutton v. Strong*, ante, lays down the correct rule, that "piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; * * * whether they are the one or the other may depend * * * upon the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure." See: *State v. Jersey City*, 25 N. J. L. 525; *The Wharf Case*, 3 Bland, 361; *Swords v. Edgar*, 59 N. Y. 28; Gould, *The Law of Waters*, sec. 119.

Does the contract in question limit the use of the wharves to the Steamship Co. so as to make them private wharves? When a wharf belonging to an individual or a private wharf is thrown open to the use of the public, it becomes affected with a public interest and must be open to all upon the same terms and conditions. *De Portibus Maris*, 1 Harg. Law Tracts, 78; *The Wharf Case*, 3 Bland, 361; *Munn v. Illinois*, 94 U. S. 113, 151.

There can be no discrimination between different members of the public or between vessels from different ports.

The Columbian Exposition Co. built these wharves and has the control of them. In the contract with the Steamship Co. it reserved the right for the landing and embarkation of passengers at the pier at Jackson Park from and to boats coming from and returning to points outside of the points specifically named which are, Kenosha upon the north and East Chicago Harbor on the south. This in effect is to declare that complainants and others running boats from points between Kenosha and East Chicago to Jackson Park or the pier, shall not use the pier, but that all boats from those points and all places outside of those two points, without regard to the ports from which they come or the ownership thereof, may use this pier at Jackson Park.

The people owning vessels between those two ports are as much a part of the public and are entitled to as many privileges as to the use of the pier as those from and outside of the two points mentioned. It is an illegal discrimination between ports and vessels and tends to obstruct commerce.

I am of opinion that the contract referred to is a legal one, made in the interests of the public, and is to the great advantage of the public as to the transportation between the two parks and parts of the fair, but that the reservation above specified, if acted upon, will entitle the complainants and others to the same rights and privileges at least as may be accorded to boats coming from points outside of Kenosha on the north and East Chicago Harbor upon the south.

The complainants are entitled to an injunction restraining the defendants, the Columbian Exposition Co. and the Steamship Co. from preventing the complainants from landing their vessels and embarking and disembarking passengers and freight at the Jackson Park pier upon the same terms and conditions that it may permit other vessels from Kenosha on the north and East Chicago Harbor on the south, and points beyond those ports, to land at, and embark and disembark passengers from said Jackson Park pier.

As to the small pier heretofore used to land and disembark

passengers at Jackson Park, it was within the power of the park commissioners to discontinue its use as a landing place and is clearly within the power of the Exposition to do so. It does not follow because the public was permitted to use it that the public has the right to use it forever.

As the Illinois Central Railroad and the city of Chicago, defendants herein, have not been served with process, no rulings now made will be taken to affect their respective rights and interests.

(Circuit Court of Cook County.)

Havemayer, et al.

vs.

Bordeaux Co., et al

(March 19, 1894.)

1. **CORPORATIONS—PREFERRED STOCK, RIGHT OF AN ILLINOIS CORPORATION TO ISSUE.** A corporation can issue preferred stock when authorized by its charter, or by statute, or if all stockholders give their consent thereto.
2. **SAME—ESTOPPEL TO QUESTION VALIDITY OF PREFERRED STOCK.** Even in the absence of power to issue preferred stock a corporation may be estopped from avoiding its preferred stock where all the stockholders consented to the issuance thereof, and where the claim of the corporation is inequitable.
3. **SAME—RIGHT TO DEAL IN THEIR OWN STOCK.** A corporation may deal in its own stock at least to the extent of receiving payment, or to secure a debt due to the company, but the purchase by the directors of the company's stock will be upheld as within their power, if not fraudulent. Generally it will not be upheld, if in violation of the rights of creditors.
4. **CORPORATE STOCK—RIGHT OF PLEDGEEES OF CORPORATE STOCK TO VOTE SAME, OR TO NOTICE OF ACTS OF DIRECTORS.** Pledgees do not stand in the place of the owners of stock, as they are not liable as stockholders, have no right to vote the stock, and are not entitled to any notice of the acts of the directors.
5. **FORECLOSURE PROCEEDINGS—SOLICITOR'S FEE, REASONABLENESS OF.** A fee of fifteen hundred dollars to complainants' solicitor for foreclosure of the mortgage is reasonable, considering the amount and nature of the services rendered and necessary to be rendered to final decree.

Circuit court of Cook county. Foreclosure bill filed by bondholders and trustee, to foreclose the property of the corporation. Intervening petition by stockholder, making the same defense as the company. Exceptions to master's report overruled. Order for decree. Heard before Judge Thomas G. Windes.

STATEMENT OF FACTS.

Prior to July 24, 1890, one Edward O. Russell was the owner of a ground lease for a term of 198 years from May 1, 1890, of the real estate described in the bill and known as Nos. 339 and 341 Michigan avenue, Chicago, the rent thereon being payable yearly. Said Russell, Charles E. Rand and Hulburt Dunlevy some time prior to July 24, 1890, organized the Bordeaux Company, an Illinois corporation, for the purpose of carrying on a hotel business on said premises, subscribed for all the stock of said corporation, consisting of 1,000 shares of the par value of \$100 each, the said Russell taking 998 shares and said Rand and Dunlevy one share each. The said subscribers for stock were also the first board of directors of said company.

At the first meeting of directors held July 24, 1890, at which all the stockholders were present, said Russell was elected president and treasurer and said Rand secretary of the company; by-laws were adopted, an assessment of 100 per cent upon all stock was levied, and it was resolved to issue \$25,000 of the company's stock as preferred stock on the terms set out in the master's report. At the same meeting it was also resolved to purchase said leasehold from said Russell for \$25,000 cash, or, if Russell would accept it, the treasurer was authorized to issue said preferred stock in payment for said lease. At a subsequent meeting held on September 27, 1890, at which all the directors and stockholders were present, the action of July 24 in regard to preferred stock was rescinded, and the same amount of stock was made preferred stock and entitled to eight per cent cumulative dividends after May 1, 1891, over all other stock, and also to pay-

ment in full at par in case of a sale of the company's property, and also to share ratably with the common stock in any excess, above par value of all the stock, which might be realized by sale.

The resolution for the purchase of the lease was also reaffirmed, and Russell was empowered to erect a building on said leased premises at a cost of \$108,000 to be paid as follows: \$33,000 in first mortgage bonds of the company, \$74,800 in the common stock of the Bordeaux Company and \$200 in cash. The first mortgage bonds were secured by trust deed to John R. Walsh and became due on the first day of July, 1910, and bore interest at the rate of $6\frac{1}{4}$ per cent per annum, and payable semi-annually, as evidenced by coupons thereto attached, and provided, among other things, that in case of default for thirty days in payment of any installments of interest the whole of the principal secured by said bonds might be declared due and payable. This action in making said stock preferred and in the purchase of said lease was assented to in writing by all of the then stockholders in said corporation.

The preferred stock was issued to Russell and he proceeded with the erection of a building upon said premises which was intended for a hotel, and completed it in August, 1891. Russell received from time to time after the 27th of September, 1890, and in pursuance of the terms of his contract with said company, said first mortgage bonds and the common stock contracted for by him. Portions of the building were rented and the company continued business with the original directors until July 8, 1892, when said Rand and Dunlevy resigned and John A. Ryerson and Edward Peters were elected directors in their stead. July 8, 1892, the company had contracted a floating indebtedness of about \$24,000, besides its said first mortgage bonds; and while its assets at a fair valuation exceeded its liabilities by about \$82,000, the affairs of the company were in a critical condition and its insolvency was imminent, it was still a going concern, and, before the law, solvent.

At this date, and in order to make provision for said floating indebtedness, to reduce the charges on the company's net earnings and profits and for putting improvements upon and furnishing parts of the company's building to the extent of \$3,500, the directors on behalf of the company, the holders of the preferred stock and John A. Ryerson as trustee, entered into an agreement by which the company agreed to exchange said preferred stock at \$109.33 per share for an equal amount in par value of seven per cent second mortgage bonds of the company, and the holders of said preferred stock agreed to surrender said stock to the company and accept said bonds and also to furnish the money to pay said floating indebtedness, and to make said improvements, and to furnish parts of said building not to exceed \$3,500, and also to pay the expenses and attorney's fees incurred in negotiating and carrying into effect said contract.

Pursuant to and in compliance with terms of said agreement said company executed and delivered to said Ryerson, as trustee, its seven per cent second mortgage bonds to the amount of \$57,000 becoming due on or before July 1, 1897, and bearing interest at the rate of seven per cent per annum, payable monthly, the principal and interest to be payable in gold, and to secure said bonds and interest the company executed and delivered to said Ryerson its trust deed of the same date as said bonds, by which was conveyed to said Ryerson, as trustee, all the property of said company of every kind.

This trust deed, among other things, provides that said interest should be paid promptly when the same became due according to the provisions of said bonds and trust deed, and that the company should deliver to said trustee on or before the 10th day of each month, beginning with the month of August, 1892, and continuing during the life of said trust deed, a statement in writing, over the signature of the president of said company, showing in detail the receipts and disbursements of the company received and paid out during the preceding month, and also showing in detail the indebtedness

of the company exclusive of bonded indebtedness as it stood on the first day of the preceding month, and also that if any default whatever should be made in any of the covenants or agreements and provisions in said deed, and if such default should continue for 30 days after the same occurred, then at the option of the holder of any of said bonds after the expiration of 30 days, without notice to said company or its successors or assigns, might declare the whole of said indebtedness due and payable, and file a bill to foreclose said trust deed in any court having competent jurisdiction, and out of the proceeds of any such sale there should be paid reasonable attorney's fees for the complainants in such suit.

It will be noted that John A. Ryerson, who was one of the directors of the company, was also one of the holders of the preferred stock, the trustee in said trust deed, and was charged with carrying out the provisions of said agreement between the company, the holders of preferred stock and himself as trustee.

Further, in pursuance of the terms of said agreement, the holders of said preferred stock paid to said Ryerson as trustee \$27,666.68 in cash, and assigned their certificates of stock to the company which are now in the possession of the company.

Of the said second mortgage bonds delivered to said Ryerson he distributed \$55,000 among said preferred stockholders, \$27,333.32 on account of said stock and \$27,666.68 for said cash advanced. The remaining \$2,000 of said bonds are still held by said Ryerson and have never been issued. The owners of the common stock on July 8th, 1892, to wit: The said Russell, Peters and Dunlevy, in writing, ratified, confirmed and consented to the foregoing contract. The provisions of this contract were carried out by said Ryerson, except that he had in his hands \$162.62 to be paid on certain debts of the company named in said agreement, and the further sum of \$602.13 which was applied and credited on the principal of the said bonds under said contract.

The company made default in its payments of installments

of interest on said bonds becoming due September 1st and October 1st, 1892, respectively and also failed to make the statements of receipts, expenditures and financial condition each month after the date of said trust deed, as required thereby, and by reason of said defaults on November 4, 1892, the complainants, the then owners of said second mortgage bonds, under the terms of said trust deed, and after default in payment of interest due on November 1st, 1892, elected to and declared all said bonds due, and directed said Ryerson to file the bill in this case, which was done in the names of the bondholders and said trustee the same day. Prior to July 8th, 1892, said Russell, the then owner of 592 shares of the common stock of said company, had hypothecated the same with divers parties as collateral security for advances made to him. The persons holding said hypothecated stock did not consent to the agreement and trust deed of July 8th, 1892.

The intervening petitioner, William P. Porter, is the owner of five shares of said common stock and makes the same defense to the complainants' bill herein as is made by the company.

In this court on November 18, 1892, the complainants, Havemeyer and others, obtained judgment by confession upon ten of said bonds under the power of attorney in said bonds contained for \$10,308.05 and costs.

Quigg & Bentley, solicitors for complainants.

Tewkesbury & Culver, solicitors for defendants.

WINDES, J.:—

It is contended for the defendants that said Ryerson made wrongful payments in several instances in the disbursements of the cash paid to him by the preferred stockholders under the agreement of July 8, 1892, but after full consideration of the evidence, the master's report and arguments of counsel, the court sees no reason to conclude differently from the master in regard to those payments, and is of opinion that all said payments were rightfully made.

It follows that if all the payments made by said Ryerson under said agreement of July 8, 1892, were rightfully made, then the statement above made by the court, that there was a default in the payment of the interest due on said bonds, is also well founded, unless the balance of \$602.13 left in the hands of the trustee, Ryerson, should have been applied upon interest, the interest then due being less than that amount, instead of upon the principal of said bonds. This sum was properly applied to the principal of said bonds because the agreement of July 8, 1892, by a fair construction of its provisions, provides that any surplus remaining after the disbursements provided for by said contract should be divided among the parties contributing to the fund placed with said Ryerson.

As to the default of defendant, above stated by the court, in failing to make the statements of its receipts and disbursements, and a detail of its indebtedness, the court is of opinion that this was a material and important provision of said trust deed when considered in connection with the nature of the property conveyed by said trust deed and the business of the company, and the complainants were, under the evidence in the record and finding of the master, entirely justified in their action by reason of the default of the company in this record, in declaring the principal of said bonds due and directing the foreclosure of said trust deed.

The court has deemed it unnecessary to go into any discussion of the evidence as to the solvency of the defendant corporation or the payments made by the trustee under the agreement of July 8, 1892, or the default of the company in payment of interest or making statements, but has considered it sufficient to state only the conclusions arrived at after full consideration, which has been done.

Great stress has been laid by counsel for defendants upon the remarkably complicated relations sustained by the complainant, John A. Ryerson, to the parties in this case. He was a director of the defendant corporation, the representative of the preferred stockholders, himself also a preferred

stockholder, in one instance, at least, the attorney of the corporation in litigation prior to the commencement of this suit, and the trustee and agent of the corporation and preferred stockholders during a period of about one year prior to the filing of this bill, and also for a time one of the company's solicitors in this case. It must be admitted that this complication and blending of apparently inconsistent and diverse interests are such as are calculated to cause the court to look with scrutiny at Mr. Ryerson's testimony, which has been done; but inasmuch as all his acts appear to have had the approval of the other directors of the Bordeaux Company, and in conformity to the agreement of July 8, 1892, unless it be in the matter of the amount of attorneys' and trustees' fees, there being no proof of fraud, it seems to the court there is no sufficient foundation in the record to justify it in holding that any of the payments made by him except such as have been corrected, were improperly made. The payments made for these fees appear to be reasonable under all the circumstances shown. Even if these payments were held to be wrongful the only effect would be, under the agreement of July 8, 1892, to reduce the amount of complainants' claim. That Mr. Ryerson should claim one-half the fees allowed to complainants' solicitors in this case seems rather remarkable, but that claim should not prejudice complainants' rights in any way, especially since these rights are not dependent upon Mr. Ryerson's testimony.

There remain but two principal questions to be considered, as follows: First. The validity of the preferred stock. Second. The validity of the contract of July 8, 1892, and the exchange of the preferred stock for bonds. The textbooks, it is true, state as a general rule, that to enable a corporation to issue preferred stock it must have authority by statute, or its charter. Cook, *Stockholders* (1st Ed.) sec. 268; 2 Beach, *Private Corporations*, sec. 498. It is argued that under these authorities, and because there is no authority given by the charter of the Bordeaux Company, or by our statute, therefore the act of the company in issuing preferred

stock is void. The later edition of Mr. Cook on Stockholders, section 267, as also Mr. Beach, section 500, say, in substance, that there is no principle of law which forbids the issuance of preferred stock if all the stockholders give their consent. This seems to the court to be reasonable and in accordance with the decisions of the later cases and text writers. *Morawetz, Corporations*, sec. 464; *Harrison v. Mexican Railway Co.*, 44 L. J. Ch. 403; *Hazlehurst v. Savannah, etc., Ry. Co.*, 43 Ga. 13; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Branch v. Jesup*, 106 U. S. 468; *Warren v. King*, 108 U. S. 389.

Besides this, if there was a want of power to issue preferred stock, the proof in this case that all the stockholders consented to making this preferred stock, and agreed to its issuance in payment for a valuable leasehold worth at least its face in cash at the time, and now worth many thousands of dollars in excess of that sum, would make it highly inequitable for the corporation now to claim the benefit of this leasehold, as it does, and claim that the consideration paid for it was worthless at the time. By the plainest principles of equity there is an estoppel against the corporation from making any such claim. *Hazlehurst case, supra*. *Cook, Stockholders*, sec. 267, and 500. *C., R. I. & P. R. R. Co. v. Joliet*, 79 Ill. 25; *Darst v. Gale*, 83 Ill. 136 and cases cited; *City of East St. Louis v. East St. Louis, etc., Co.*, 98 Ill. 415; *P. & S. R. R. Co. v. Thompson*, 103 Ill. 187.

That there appears to be nothing in the statutes in this state which in express terms authorizes the issuance of preferred stock, the court does not deem important, in view of the foregoing conclusions and authorities, and has therefore not mentioned in detail the arguments of defendant's counsel in that regard.

As to the next question, the validity of complainant's bonds received in exchange for the preferred stock, it should be noted that this stock was entitled to a cumulative dividend of eight per cent per annum from May 1, 1891, before any dividend should be paid on the remaining stock of the company, and in case of a sale of the property of the company was en-

titled to receive out of the proceeds of sale full par value before any payment on account of other stock.

This stock was exchanged under the agreement of July 8, 1892, for bonds at a premium of 9 1-3 per cent, or an advance of \$2,333.33. This, it is claimed by defendants, was fraudulent as to the other stockholders, but the court is of opinion this contention is not sustained and is very unreasonable in view of the admitted facts of the case. The agreement of July 8, 1892, should be considered as a whole and in view of the financial situation of the defendant company. Without the aid of the preferred shareholders the company could not have continued long in business after that date. Its floating indebtedness exceeded \$20,000 and was pressing, and the first mortgage indebtedness might have been foreclosed in default of interest being paid for thirty days, and for divers other reasons. If the preferred shareholders had conceived the idea of wrecking the company, as claimed by defendants, it would have been very easy for them to have declined to assist the company, and allowed its property to go to sale under proceedings in court by the holders of the floating indebtedness or by the holders of the first mortgage indebtedness and bought at such sale, or could have obtained their money for the preferred stock from the proceeds of such sale in preference to the holders of the common stock, or if the business could go on and there were profits realized the preferred shareholders could take all these profits to the extent of the dividends of eight per cent from May 1, 1891.

If the contention of defendants is true that the property was valuable, and there was a large margin for the stockholders, then, certainly, it was to the interest of the common stockholders for the business of the company to continue and profits to be made. If there was a possibility of profits for the holders of the common stock, then certainly the preferred stockholders had a most excellent investment which, in view of what appeared to be the prospects of the company on July 8, 1892, on the basis of its floating indebtedness being paid and its building and property being improved so as to yield a

good income, made the preferred stock worth a premium and all that was claimed for it in the exchange.

Also, if it could not be considered as worth the premium paid, the fact that the preferred stockholders furnished the money to pay the debts of the company and to buy furniture and improve its property, so as to make it possible for the company to continue its business, when the officers of the company had theretofore been unable to raise the money to pay the floating indebtedness, and assigning their stock which entitled them to eight per cent interest, was an ample and full consideration for the bonds which drew seven per cent interest. There then being a valid and a sufficient consideration given by complainants for these bonds, they must be valid obligations of the company, if it had the power to exchange them for the stock.

The defendants contend this exchange was *ultra vires*, and to the extent of \$27,666.66 the complainants have no right of recovery in this case. It seems to be the established law, as laid down by the text writers and the best considered cases, that a corporation may deal in its own stock, at least may receive its own stock in payment of, or to secure a debt due the company. *Brice, Ultra Vires* (2nd Ed.) p. 177, and cases cited; *Dupee v. Boston, etc., Co.*, 114 Mass. 37; *Fraser v. Ritchie*, 8 Ill. App. 554, and cases cited; *C. P. & S. W. R. R. Co. v. Marseilles*, 84 Ill. 643, and cases cited; *Chetlain v. Republic Life Ins Co.*, 86 Ill. 220. The contention is made that this exchange amounted to a retiring or decrease of \$25,000 of the capital stock of the company, that the statute provides a way in which that should be done and therefore excludes this way of decreasing the capital stock. The answer to this is that the stock in this case was not cancelled but only assigned to the company, and may again be resold. *Cook, Stockholders*, sec. 314. In any event, unless prohibited by the charter, as was not the case at bar, the purchase by the directors of the company's stock is a matter within their power and will be upheld if not fraudulent. Generally it will not be upheld if in violation of the rights of the creditors.

In the case at bar no creditor is complaining, the act was approved by all the stockholders, and, as it seems to the court, it appeared at the time it was done to have been highly advantageous to the company, had its officers' expectations as to business been realized. Cook, Stockholders, secs. 907, 712.

It was also contended in the argument that inasmuch as a large amount of the common stock had been pledged by Russell prior to the making of this agreement of July 8, 1892, and these pledgees had no notice of this agreement and exchange, it was a fraud as to those pledgees and should be so held. The pledgees do not stand in the place of the owners of stock, are in no way liable as stockholders, and have no right to vote the stock and have no right to any notice of the acts of the directors. Revised Statutes, Illinois "Corporations," ch. 32, secs. 23, 24; Cook, Stockholders, secs. 40, 612, 733; *McDaniels v. Flowerbrook Manufacturing Co.*, 22 Vermont, 274; *Gibson v. Richmond & D. R. Co.*, 37 Fed. 743; *Mann v. Currie*, 2 Barb. 294; *Parsons v. Hayes*, 14 Abbott's New Cases, 419.

The master's report will be confirmed, and unless counsel can agree as to what will be a reasonable fee for the master's report the court will, after hearing counsel, fix master's fee.

The fee for complainants' solicitor may be fixed by the decree at \$1,500 which the court regards as reasonable considering the evidence and the amount and nature of the services rendered and necessary to be rendered in case no appeal should be taken.

NOTE.

(The above case is cited in Cook on Corporations (5th Ed.) pp. 584, 599, 670, 949.)

RIGHT OF AN ILLINOIS CORPORATION TO ISSUE PREFERRED STOCK.

In *Higgins v. Lansingh*, 154 Ill. 301, 389 (1895), it appears that some time after its incorporation, The Rosehill Cemetery Company, at a meeting of the managers, authorized an issue of \$25,000 of preferred stock to pay the debts of the company. A meeting of the stockholders had previously been called and by resolution had authorized the board of managers to issue that amount of preferred stock. It does not appear that any holder of stock or certificates of

interest objected to such issue. In pursuance of this action of the stockholders and managers preferred stock to the amount of \$25,000 was issued and used in paying various liabilities incurred by the company. The resolution authorizing its issue provided that the holders of this stock should be entitled to receive thereon a semi-annual dividend at the rate of ten per cent. per annum prior to the payment of any dividend on the other stock of the company. This dividend was paid, as authorized for many years, and the issuing of the stock appeared to have been acquiesced in by all the holders of the stock. It was held that after such acquiescence a stockholder was estopped from questioning the validity of this preferred stock. The court there said (p. 392): "The objections to the issue of preferred stock without power therefor under the charter are based upon the assumption that such issue would be in violation of the contract rights of the existing shareholders. If the existing shareholders unanimously give their consent to an issue of preferred shares, these objections would have no application. . . . It is, however, held that if otherwise properly issued and outstanding as corporate stock it may be valid as preferred stock by the original authority and consent of all the shareholders, or by their subsequent ratification or long acquiescence, notwithstanding the charter contains no authority for the issue of preferred stock."

In *First National Bank v. Peoria Watch Co.*, 191 Ill. 128, 135 (1901), it was held that a corporate creditor could not object to the issue of preferred stock so long as it was fully paid for, even though such stock was made preferred stock by agreement of stockholders, and not in accordance with any statute. The court there said (p. 135): "It can make no difference to a creditor if some part of the stock was issued as preferred stock, so long as the money went into the treasury and the dividends on such preferred stock were not paid or to be paid except out of net profits."

In *Cratty v. Peoria Law Library Association*, 219 Ill. 516 (1906), where at the incorporation of a law library association a preferred or guaranteed stock was created, the preferred stock was held to be validly issued, and dividends thereon were held enforceable from the net income, but not out of the capital stock. The court said (p. 523): "There is no objection to an agreement for preferred or guaranteed stock in the original organization of a corporation, where, as in this case, all the parties agree to it. Whether the stock is to be called interest-bearing stock, preferred stock or guaranteed stock makes no difference, as the terms when applied to shares of stock mean practically the same thing."

It is apparent, therefore, from the above cases that in Illinois a corporation of that state may by unanimous consent of all its stockholders issue preferred stock.—Ed.

(Criminal Court of Cook County.)

People

vs.

J. W. Reeves.

(January, 1896.)

1. **PHARMACY ACT, PENALTIES THEREUNDER, HOW RECOVERABLE, CIVIL SUIT.** Where the legislature declared in the penal clause of the Pharmacy Act that "all suits for the recovery of the several penalties . . . shall be prosecuted in the name of the people . . . in any court having jurisdiction," it intended that a civil suit in debt might be commenced before a justice of the peace or in a civil court of record.
2. **SAME—CRIMINAL PROSECUTION.** The words in the penal clause of the Pharmacy Act "and it shall be the duty of the state's attorney . . . to prosecute all persons violating . . . this act upon proper complaint being made" indicate that the legislature besides civil suits contemplated that criminal prosecutions might be instituted for the recovery of the penalties prescribed by the act.
3. **SAME—VIOLATIONS OF AS MISDEMEANORS.** As in Illinois the doing of the act prohibited by statute is a misdemeanor when not amounting to a felony, violations of the Pharmacy Act are misdemeanors.
4. **STATUTES—PENAL—CONSTRUCTION OF—REMEDY PROVIDED THEREIN.** Where a statute gives a penalty and prescribes a form of action, in which the remedy may be had, that form of action must be followed and no other.
5. **CRIMINAL COURT—PROSECUTIONS THEREIN—PROCEDURE.** The only method of prosecution known to Illinois law in the criminal court is by indictment.
6. **PHARMACY ACT—CONSTRUCTION OF—MANNER OF CRIMINALLY PROSECUTING VIOLATIONS OF—POLICY OF LEGISLATURE.** Construing the Pharmacy Act in conjunction with other statutes and in the light of the established policy of the legislature to provide other tribunals than the criminal court for the collection and enforcement of fines and penalties, it is apparent that a violation of the Pharmacy Act is not indictable although the penalties provided therein may be recovered by the state's attorney by a criminal complaint before a justice of the peace.

Motion to quash indictments. Nos. 3066, 3073. The facts are stated in the opinion. Heard before Judge Edward F. Dunne.

DUNNE, J.:—

Defendant Reeves has been indicted on eight different charges, setting up eight different violations of the amended act relating to the practice of pharmacy in the state of Illinois, in force June 27th, 1895. The penalties for said violations, as provided in said act, are not less than \$5 and not more than \$100.

Defendant has moved to quash each and all of said indictments upon the ground of *no jurisdiction* in the criminal court.

The contention of counsel for defendant is that the act in question is not comprised in the criminal code, that the violations of the act complained of are not declared to be misdemeanors, that the penalties provided for are *penalties* recoverable by civil suit and not *finer* collectible by criminal prosecution, and that therefore, the proper procedure for the collection of said penalties is a *civil action in debt* for the recovery of the penalties and not a *criminal prosecution* by indictment in the criminal court.

To determine the question as to whether or not a violation of the provisions of the act in question is a misdemeanor and therefore a criminal offense, a careful examination of the act and of our statute defining a misdemeanor, becomes necessary.

The pharmacy act, as amended, contains seventeen sections, the first sixteen of which contain the requirements of the act and the penalty for its violation, and the last of which provides for the method of the enforcement of the penalties. The violation of the act set forth in the eight indictments under consideration are punishable with "penalties" not fines ranging from \$5 to \$100. On the matter of the enforcement or collection of these penalties, section 17 provides: "All *suits* for the recovery of the several *penalties* prescribed in the act shall be prosecuted in the name of the People of the state of Illinois in any court having jurisdiction, and it shall be the duty of the state's attorney * * * to prosecute all

persons violating the provisions of the act *upon proper complaint being made.*"

In enacting this section, the legislature evidently did not understand or apprehend the distinction between criminal and civil proceedings or it contemplated and intended the enforcement of these penalties both civilly and criminally. The latter is the more probable and it is the duty of a court in construing a statute to give it such interpretation as will give force and vitality to all its provisions which are consistent with each other. I conclude, therefore, that when the legislature declares in section 17 that "*all suits* for the recovery of the several *penalties* prescribed in this act shall be prosecuted in the name of the people * * * in any court having jurisdiction," that it intended that a civil suit in debt might be commenced either before a justice of the peace or in a civil court of record. The fact that the words "prosecute a suit" as distinguished from a *criminal proceeding* were used in close context with the words "in any court having jurisdiction" satisfies this court that the legislature had in contemplation the commencement of a civil suit in one of many different courts having jurisdiction.

Now immediately following this language, appears the following: "And it shall be the duty of the state's attorney * * * to prosecute *all persons* violating the provisions of this act *upon proper complaint* being made." As the preceding words clearly indicate that the legislature had in mind the commencement of civil suits so do these words clearly indicate criminal prosecution.

We must conclude, therefore, that the legislature authorized the collection of these penalties in both civil and criminal proceedings in courts having jurisdiction of the same.

But counsel for the defendant contends that a violation of the statute in question is not a misdemeanor or criminal offense, that the violation of the provisions thereof merely subjects the person so violating to the payment of a penalty to the State Board of Pharmacists to be collected by an action of debt in the name of the people.

In the absence of the statutory definition of a misdemeanor there might be some force in counsel's position but the definition of a misdemeanor as contained in our criminal code removes the matter from the realm of discussion. Sections 277 and 278 of our criminal code are as follows: Sec. 277: "A felony is an offense punishable with death or imprisonment in the penitentiary." Sec. 278: "Every other offense is a misdemeanor. Where the performance of any act is prohibited by any statute and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor." The violation of any *statute* then, which does not amount to a felony is a misdemeanor. The court is therefore forced to conclude that a violation of the pharmacy act is a misdemeanor. But assuming that the violations of the Pharmacy Act set up in the indictments are misdemeanors and that the legislature has provided for the enforcement and collection of the penalties therein by both civil and criminal proceedings, it does not follow that the motion to quash must be overruled. Defendant, in support of his motion to quash urges upon the court the further ground that where the statute creating the offense provides a method and tribunal for the enforcement and collection of the fines or penalties, the fines or penalties should not be enforced or collected in any other method or tribunal.

This contention of counsel is supported by authority. In *Confrey v. Stark*, 73 Ill. 187, our supreme court declared the law to be as follows: "It is a uniform rule, well recognized by all courts that where a statute gives a penalty and prescribes a form of action, in which the remedy may be had, that courts are powerless to change the remedy and permit a recovery to be had in any other form of action. The will of the general assembly is supreme and must be obeyed as expressed." *State v. Meyer*, 1 Spear (S. C.), 305; *State v. Helgen*, 1 Spear (S. C.), 310; *State v. Maze*, 6 Humphrey (Tenn.), 17.

That it is the settled policy of the law in the state of Illinois to provide in special ways for the collection or enforce-

ment of fines and forfeitures created and provided by general laws not comprised in the criminal code is evidenced by an examination of the revised statutes. The same examination further discloses the fact that the legislature has been decidedly averse to the enforcement and collection of such fines or forfeitures by indictment. The court has examined at random some fifty different statutes in the revised statutes of this state providing for fines, forfeitures and penalties for violations of certain acts not contained in the criminal code and has found only five of the same provide for the recovery of the fine or penalty by indictment. The penalties and fines in all other cases are recovered by civil suit before either justice of the peace or a court of record or by criminal complaint before a justice of the peace.

The reason for this plain policy of the legislature is manifest. Not for every small violation of the statutes creating misdemeanors which are *mala prohibita* and not *mala per se* shall a citizen be exposed to the ignominy and public humiliation of an indictment in the criminal court. If the penalties can be enforced and collected by a civil suit or by prosecution in a justice court, why should the reputation of the offender be smirched in addition? It is well known that the finding of one indictment against a person becomes by the publication thereof, the subject of more comment and notoriety in a community than the commencement of fifty suits before a justice of the peace for fines or penalties.

The legislature, in providing for the enforcement and collection of fines has evidently kept this in mind and in nine out of every ten cases have therefore provided for the collection of the same in a manner which will not expose a citizen to unnecessary and uncalled for humiliation and disgrace.

Keeping in mind this policy of the legislature, as evidenced by these laws, let us endeavor to ascertain the intent of the legislature when in the pharmacy act it uses the words "it shall be the duty of the state's attorney to prosecute all persons violating the provisions of this act *upon proper complaint being made.*" This language plainly indicates a crim-

inal prosecution and if the duties of the state's attorney were confined to the criminal court it would follow that the state's attorney should prosecute in the first instance in the criminal court and by indictment. The only method of prosecution known to our law in the criminal court is by indictment. Crim. Code, sec. 384. Upon turning to the act on state's attorneys, however, we find that among the duties of state's attorneys are: "Sixth—To attend before justices of the peace and prosecute charges of felony and misdemeanor * * * when in his power so to do."

By construing sec. 17 of the pharmacy act in conjunction with the act governing state's attorneys in the light of the established policy of the legislature as indicated by the provisions of the fifty different statutes above mentioned, to provide other tribunals than the criminal court for the collection and enforcement of fines and penalties this court has come to the conclusion that the penalties provided in the pharmacy act should be collected either by civil proceedings in any court or by criminal complaint before a justice of the peace "upon proper complaint being made."

The motion of the defendant should therefore be sustained and the indictments quashed. And it is so ordered.

NOTE.

See *Hodgman v. People*, 4 Denio (N. Y.), 235; *State v. Corwin*, 4 Mo. 609.—Ed.

(Probate Court of Cook County.)

In re Estate of James Long, Deceased.

(1879.)

1. **MARRIAGE SETTLEMENT—REAL ESTATE—LIMITATIONS TO HEIRS OF BODY OF CONTRACTING PARTIES, ETC.—EFFECT IN EQUITY.** It is a fundamental principal of the law of marriage settlements that if the real estate of the husband or wife is limited to the heirs of the body or to the issue of the contracting parties, or

- either of them, or to the issue of their body, or to the issue and their heirs, equity will not take the words in their legal sense, but will limit the estate to the parents for life and the children will take at the death of their parent or parents as purchasers.
2. **SAME—Marriage settlements in which the provision for the issue of the marriage, heirs of the body or the issue of the contracting parties, or either of them, or to the issue and their heirs is wanting, form no exception to the general rule and the parents can defeat the estate of the children.**
 3. **RULE IN SHELLEY'S CASE—DEFINED.** When a person takes an estate of freehold legally or equitably under a deed, will or other writing and in the same instrument, there is a limitation by way of remainder, either with or without the interposition of another estate of an interest of the same legal or equitable quality to the heir or heirs of his body as a class of persons to take the succession from generation to generation the limitation to the heirs entitles the ancestor to the whole estate.
 4. **TRUSTS—REAL ESTATE—DECLARATION TO A'S HEIRS SUBJECT TO OCCUPANCY DURING JOINT LIFE OF A AND WIFE AND THE SURVIVOR—EFFECT.** Where a trust in land is declared for the use and occupation of A and his wife during their natural lives; for the wife during life if she survived A; for A and his heirs in case he survived; and after her death, in case she survived A, to such persons as he should by will appoint, A takes a fee simple estate encumbered only by the life estate of his wife.

Application by administrator for order to sell land to pay debts. The facts are stated in the opinion. Heard before Judge Knickerbocker.

C. A. Burley, for administrator.

Beam & Cooke, for A. H. Fisburn, a judgment creditor.

Van H. Higgins, in opposition to petition.

Barker, Buell & Barber, for heirs.

KNICKERBOCKER, J.:—

On September 23rd, 1874, James Long was seized in fee simple of the title to lots 18 and 19, in block 2, in Hyde Park, in this county, and on that day he conveyed the same by warranty deed to one Emma C. Church, for an expressed consideration of \$25,000. October 2, 1874, Emma C. Church executed her declaration in writing, reciting said conveyance to her from James Long, and stating in the declaration that

the consideration of Long's conveyance to her was a marriage contemplated soon to take effect between said James Long and herself, and for the purposes and upon the uses and trusts as in the instrument stated, which are substantially as follows, viz:

1. For the joint use and occupation by herself and said James Long, during their natural lives.

2. For her own use and occupation during her natural life, in case she survived said James Long.

3. In trust for said James Long, his heirs and assigns forever, in fee simple, after her decease, in case said James Long survived her.

4. In trust, in case she survived said James Long, and after her decease, for such persons and in such manner as said James Long might, by his last will and testament, direct and appoint, and in case said James Long should not, by his last will and testament, so direct and appoint, then, for the heirs at law of said James Long, after her decease.

On October 3d, 1874, marriage was solemnized between said James Long and Emma C. Church. James Long died intestate April 10, 1876, leaving him surviving Emma C. Long, his widow, and Francis M. Barker, Clara C. Wait, Eugene C. Long, James H. Long and John C. Long, his five children by a former marriage, his only heirs at law. The administrator of his estate has applied for an order to sell the land in question to pay debts, claiming that by the terms of said deed and declaration of trust, the heirs of said James Long take the title to said real estate by descent, encumbered by the life estate of said Emma C. Long, and charged with the payment of the debts of said Long, in case of a deficiency of personal estate.

The heirs of James Long insist that, at the time of his death, he was not seized of such claim or title to this land as can be sold or reached by the administrator, and that under the declaration of trust they take as purchasers and not by descent.

By this declaration of trust, no intention of providing for

the issue of the marriage between James Long and Emma C. Church is expressed, nor can any be inferred; therefore this case must stand on an entirely different footing from the cases cited by the counsel for the heirs, in which provision is made by way of marriage settlement for the issue of the marriage. It has long been recognized by the courts as a fundamental principle of the law of marriage settlements, that if the real estate of the husband or the wife is limited to the heirs of the body or to the issue of the contracting parties, or either of them, or to the issue of the body, or to the issue and their heirs, so that the words and limitations taken in their legal sense, would enable the parents or one of them to defeat this provision for the children, equity will construe the articles to mean that the estate is limited to the parents for life, and the children will take at the decease of their parent or parents as purchasers: *Perry on Trusts*, 361; *Lewin on Trusts*, Am. Ed. side paging, 147; *Davies v. Davies*, 4 Beav. 54; *Preston on Estates*, 398.

Marriage articles in which this provision for the issue of the marriage, heirs of the body, or the issue of the contracting parties, or either of them, or to the issue and their heirs, is wanting, seem to form no exception to the ordinary rule of construction: *Carrall v. Renich*, 7 Smedes & Marshall, 798; *Tillinghast, et al. v. Coggeshall, et al.*, 7 R. I. 383.

Through her declaration of trust Emma C. Church declared an estate of freehold in the land in question, for James Long and herself, and the survivor of them, and gave an expressed power to James Long to make disposition of the remainder by his last will and testament, and in default of such disposition declared the remainder should pass to the heirs at law of James Long. Here is a life estate in James Long and Emma C. Long, his wife, with remainder to the heirs at law of James Long, with an expressed power to James Long to defeat the descent of the remainder.

The rule in *Shelley's Case*, which has always been regarded, not as a rule of interpretation, but as an inflexible rule of property, and one of the most firmly established, and which by the supreme court of this state was recognized as in force

here in the case of *Baker, et al. v. Scott*, 62 Ill. 86, and again recognized in *Butler v. Huestis, et al.*, 68 Ill. 594, although the facts in the last named case were not regarded by the court as justifying its application, seems to be entirely applicable to the case at bar.

The rule may be briefly stated as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and afterward, in the same deed, will, or writing, there is a limitation by way of remainder, with, or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or the person or heirs of his body by that name in deeds or writings of conveyance and by that, or some such name in wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imparted by that limitation."¹

To quote an example from Williams on Real Property, 246, *et seq.*: "Thus let the estate have been given to A and his heirs, but with a vested estate to B for his own life, to take effect in possession next after the decease of A,—thus suspending the enjoyment of the lands by the heir of A, until after the determination of the life estate of B. In such a case it is evident that B would have had a vested estate for his life, in remainder, expectant on the decease of A; and the manner in which such remainder would have been limited would, as we have seen, have been to A for his life, and after his decease to B for his life. The only question then remaining would be as to the mode of expressing the rest of the intention,—namely, that, subject to B's life estate, A should have an estate in fee simple. * * * The heir, in this case, would not have taken any estate independently of his ancestor any more than in the common limitation to A and his heirs: the heir could have claimed the estate only by its descent from his ancestor, who had previously enjoyed it

¹ See Preston on Estates, quoted in *Baker v. Scott*, 62 Ill. 86, 90, 91.—Ed.

during his life; and the interposition of the estate of B would have merely postponed that enjoyment by the heir, which would otherwise have been immediate. But we have seen that the very circumstance of a man's having an estate which is to go to his heir will now give him a power of alienation either by deed or will, and enable him altogether to defeat his heir's expectations. * * *

"The example we have chosen, of an intermediate estate to B. for life, is founded on a principle evidently applicable to any number of intermediate estates, interposed between the enjoyment of the ancestor and that of his heir. Nor is it at all necessary that all these estates should be for life only; for some of them may be larger estates. * * *"

The court is of opinion that by the execution of the declaration of trust by Emma C. Church, James Long became seized of an estate in fee simple in the lots in question, encumbered by the life estate of Emma C. Long only; that the clause in the declaration purporting to give him power to devise said land added nothing to his already complete power to alienate said land, subject to said life estate of Emma C. Long.

It therefore follows that subject to said life estate, the lots in question are subject to sale by the administrator, to pay any deficiency of the personal estate of said James Long to pay his debts.

The order will be entered accordingly.

(Criminal Court of Cook County.)

People

vs.

J. J. Walser.

(Sept. 23, 1878.)

1. CONSTITUTIONAL LAW—VALIDITY OF ACT OF APRIL 9, 1875, PROHIBITING SALES OF RAILROAD TICKETS BY UNAUTHORIZED PERSONS. The act of April 9, 1875, entitled "An act to prevent frauds upon travelers and owner or owners of any railroad, steamboat, or

other conveyances of passengers" is constitutional and valid, being a matter of mere police regulation of a public business, and the subject matter of the act is sufficiently expressed by the title of the act.

2. **POLICE REGULATIONS OF RAILROAD COMPANIES, NATURE AND EXTENT OF.** The business of railroad companies and all its common incidents are proper subjects of the police power and the nature and character of the police regulations must be determined by the legislative and not the judicial branch of the government.
3. **INDICTMENT FOR VIOLATION OF ACT OF APRIL 9, 1875.** The defendant was indicted for violation of the act of April 9, 1875. Upon motion to quash the indictment on the grounds that the act was unconstitutional and was not constitutionally passed, *held, overruling the motion*, that the act was constitutional, and that in the absence of competent evidence the question as to the passage of the act in compliance with the requirements of the constitution could not be considered.

Indictment for violation of act of April 9, 1875. Heard upon motion to quash before Judges W. K. McAllister and S. M. Moore. Opinion by Judge McAllister. The facts are stated in the opinion of the court.

MCALLISTER, J. (MOORE, J., concurring):—

This is an indictment under the act of April 9, 1875, entitled "An act to prevent frauds upon travelers and owner or owners of any railroad, steamboat, or other conveyance of passengers." Motion is made to quash the indictment on two grounds: (1) That the act is not within the scope of the police power—is an unwarrantable restriction upon the rights of private property, and therefore, unconstitutional. (2) It was not constitutionally passed.

The act relates to the business of common carriers. It has been the settled law in England and in this country, that the business of a common carrier is not only affected with a public interest, but is a public employment. This proposition is so elementary that a multiplication of authorities is unnecessary. So far as relates to railroads acting under charters or acts of incorporation, their franchises are partly of a public and partly of a private nature. So far as the safety,

convenience and comfort of passengers are concerned, they are "*publici juris*;" so far as they relate to capital and the production of revenue, they are "*privati juris*." There never has been any question of the power of the state legislatures to pass laws in the nature of police regulations affecting the exercise of such franchises so far as they were "*publici juris*"—such as those designed to secure passengers from not only danger, but imposition. The hinging point in *Munn and Scott v. Illinois*, 94 U. S. 113, carried by writ of error to the United States supreme court from our supreme court, and taken into and decided by the former, was, whether the business of keeping a grain warehouse as a mere private enterprise was a public employment, so as to subject it to the police power which might extend to a full suppression of the business. By the common law it was not such public employment, nor was there any valid statute changing that law. But a majority of the United States supreme court diverting, as many think, from established legal principles, affixed to that business a character which the law of the state did not give to it more than to any other business, viz: That it was so affected with a public interest as to be entirely subject to the police power of the state.

But all good lawyers and all courts concede that, ever since the decision in *Coggs v. Bernard*, common carriers are recognized as being engaged in a public employment, and nothing can be clearer than that, in this state, railroad companies, so far at least as concerns the safety, comfort and convenience of passengers, are proper subjects of the police power. Of this there can be no question. If the business itself be subject to the police power, then so must all its incidents and accessories be subject to it. All experience teaches that the necessities of the business require the issuing and use of tickets. They are as necessary to the convenience of both traveler and carrier as baggage checks or waybill in case of freight. The business and all its common incidents being proper subjects of the police power, then it follows from settled principles that the nature and character of the police

regulations must be determined by the legislative, and not the judicial branch of the government. After giving this matter much consideration, we are of the opinion that the act in question, being a matter of mere police regulation of a public business, is constitutional and valid. There may arise cases where the contract for carriage was made in another state, which constitutional principles would prevent falling within the range of this act, but that is no ground for holding the act void as to all cases.

The question was made that this act was not passed in compliance with the requirements of the constitution, and an unauthenticated paper, said to be a copy of the legislative journals, was put into our hands. We cannot act upon that question without evidence—competent evidence—to establish the facts upon which decision is to be made. We are also of opinion that the subject matter is sufficiently expressed by the title of the act. The motion is overruled.

This opinion having been read to Judge Moore, who sat with me at the hearing of the motion, he authorizes me to say that he concurs in the conclusions arrived at.

NOTE.

See the note to the case of *People ex rel. v. Pease* (in this volume) and the cases therein noted and reported in this volume holding the act in question unconstitutional and void.

(Circuit Court of Cook County.)

The People ex rel.

vs.

James Gilbert, Sheriff.

(April 26, 1893.)

1. CONSTITUTIONAL LAW—ACT OF APRIL 19, 1875, UNCONSTITUTIONAL. The act of April 19, 1875, entitled "An act to prevent frauds upon travelers and owner or owners or any railroad, steamboat, or other conveyance for the transportation of passengers"

comes within the section of the Constitution (Art. IV) which declares that the General Assembly shall not pass any special law granting to any corporation, association, or individual, any special or exclusive privilege, immunity or franchise whatever, and is unconstitutional and void.

2. ACT OF APRIL 19, 1875—CONSTRUCTION OF. Even under the act of April 19, 1875, a duly authorized ticket agent may sell tickets not only of the company from which he holds the authority but those of any railroad or steamboat owner.
3. HABEAS CORPUS. Petitioners were arrested under an indictment for selling railroad tickets, not being authorized to do so by the railroad whose tickets they sold. *Held* that this was no violation of the act of April 19, 1875.

Habeas corpus. Circuit court of Cook county. Heard before Judges Richard S. Tuthill, Edward F. Dunne and Samuel P. McConnell. Opinion by Judge McConnell.

STATEMENT OF FACTS.

At the November term, A. D. 1892, of the criminal court of Cook county, six indictments were returned against railroad ticket brokers doing business in the city of Chicago, for selling tickets in violation of the statute of Illinois, passed in 1875 and entitled, "An act to prevent frauds upon travelers and owner or owners of any railroad, steamboat or other conveyances for the transportation of passengers (approved April 19, 1875, in force July 1, 1875). On April 3, 1893, two of the brokers filed a petition for *habeas corpus* before Judge McConnell, two before Judge Tuthill and two before Judge Dunne. The petition averred that the indictments charged no offense known to the law of the state of Illinois; also that the statute was in violation of the commerce clause of the federal constitution, and in violation of the 14th amendment to the federal constitution, and in violation of the various provisions of the constitution of Illinois. The three judges sat together and heard the cases.

Richard Prendergast, attorney for relators.

Wm. S. Forrest and *Moritz Rosenthal*, attorneys for defendant.

TUTHILL, J.:—In the matter of the petition for *habeas corpus* filed before each of the judges sitting, I wish to say that in the opinion which will be rendered the judges all agree on all the points of it, having discussed it fully, and Judge McConnell has prepared the opinion and I will ask him to read it.

McCONNELL, J.:—

This law is a very peculiar one. It provides that it shall be the duty of the owner or owners of any steamboat or railroad to provide their agents with a certificate setting forth the authority of such agents respectively to make such sales. In sec. 2 of the act it provides that it shall not be lawful for persons not provided with such authority to sell, barter, or transfer any tickets or any evidence of the holder's title to travel on any railroad or steamboat. The second section reads as follows: "That it shall not be lawful for any person not possessed of such authority, so evidenced, to sell, barter, or transfer, for any consideration whatever, the whole or any part of any ticket or tickets, passes or other evidences of the holder's title to travel on any railroad or steamboat, whether the same be situated, operated or owned within or without the limits of this state." The plain reading of this act is, that any duly authorized agent of any railroad or steamboat may sell not only the tickets and parts thereof of the company from which he holds this authority, but those of any railroad or steamboat owner. The indictments in these cases before us are all based upon the theory that this law is violated if a person shall sell the ticket of a railroad company if not authorized by that particular company to do so. The law is plainly otherwise. He may not be authorized by a Wabash company to sell tickets, but he may sell tickets over the Wabash line if authorized by the Rock Island company to sell tickets over the Rock Island line. In each of the indictments before us it is averred that the defendant sold a ticket over a particular line, not being authorized by the corporation owning that line to sell its tickets. It does not follow that

each of the defendants may not have been authorized by the owner of some other railroad to do so. The consideration alone makes these indictments bad. None of them show a violation of this statute. Upon this ground the petitioners must be discharged.

Taking this view of the case it is unnecessary for us to pass upon the constitutionality of the law which was so fully argued before us; still we can not forbear to call attention to some striking peculiarities of this statute.

In the peculiar provision just discussed and in others, also, there is a difference between our statute and those of either Pennsylvania or Indiana, where statutes of similar import have been declared by the courts of these states respectively to be valid. Under our statute any railroad or steamboat corporation may appoint agents to sell, barter or transfer the whole or parts of railroad tickets on any line, excluding any other person or corporation from such a privilege. It may be suggested that this is a very remarkable and unusual delegation of the sovereign power of the state. It may also be remarked that it comes within the constitutional inhibition of sec. 22, art. 4 of the state constitution, which declares that the general assembly shall not pass any special law granting to any corporation, association or individual, any special or exclusive privilege, immunity or franchise whatever.

Again it may be observed that considering this law as a police regulation by the state by means of license, it is unique in that it delegates to corporations not vested of governmental power, the licensing power of the state. The act also bears intrinsic evidence of hasty preparation and slight legislative reflection.

In sec. 1 of the act it is made the duty of the owner or owners of any railroad or steamboat for the transportation of passengers to provide each agent who may be authorized to sell tickets or other certificates entitling the holder to travel upon any railroad or steamboat, with a certificate setting forth the authority of such agent to make such sales; which certificate shall be duly attested by the corporate seal of the owner of such railroad or steamboat.

Sec. 2 makes it unlawful for persons not possessed of such authority, so evidenced, to sell, barter or transfer, for any consideration whatever, tickets over any railroad or any steamboat. It seems to follow from this that the owner of a railroad or steamboat, if not incorporated, may not appoint agents, because he can not give a certificate with a corporate seal. It seems also to follow, that it would be unlawful for any agent of a private owner of a railroad or steamboat to sell tickets for the owner thereof. If the statute is susceptible of this construction, it can not be held to be valid.

It seems proper to us to make these comments, in view of the elaborate arguments made before us, and the extended consideration we have given the question involved.

NOTE.

The above opinion was referred to by the supreme court in *Re Burdick*, 162 Ill. 48, 63. See, also, the note to the case of *People ex rel. v. Pease* (in this volume) referring to the above case.—Ed.

(In the Circuit Court of Cook County.)

People of the State of Illinois ex rel.

vs.

James Pease, Sheriff.

(October 26, 1895.)

1. **MAXIMS.** Under the maxim "*Salus populi, suprema lex*" the state may in the exercise of police powers deprive the citizen of his property without compensation or legal procedure.
2. **POLICE POWER—EXTENT OF.** Under the mere guise of police regulation personal rights and private property cannot be arbitrarily invaded and the determination of the legislature is not final or conclusive.
3. **CONSTITUTIONAL LAW—VALIDITY OF LAW PREVENTING RESALE OF RAILROAD TICKETS.** The Illinois act of April 19, 1875, making it unlawful for any person not possessed of authority from railroad companies to sell, barter or transfer railroad tickets, is not a valid exercise of the police power, inasmuch as it does not affect the public health, morals or public welfare.

4. PUBLIC USE—REGULATION OF SALES OF TICKETS BY PUBLIC CORPORATIONS. It is an exercise of the right to control quasi-public corporations for a legislature to impose lawful conditions upon the original sale of a ticket by a transportation company to a purchaser, but once a ticket has been issued entitling a holder to ride and therefore transferable by delivery, any legislation in reference to the future disposal thereof is not an exercise of the power to regulate and control corporations impressed with a public duty but a bold and unwarranted interference with the property rights of citizens.
5. TITLE OF ACT AS INDICATING INTENTION OF LEGISLATURE. The aim and scope of a legal enactment is always either generically or specifically set out in its title, and an act entitled "to prevent frauds upon travelers and owners of conveyances for the transportation of passengers" is not an act to regulate or control transportation companies, but an act passed in the interests of public morals to suppress fraud—a clear and unmistakable intent to exercise the police power.
6. CONSTITUTIONAL LAW—PRIVATE RIGHTS. Any law which declares it a crime for one citizen to sell to another that which is not injurious to the public health, morals or general welfare, is not only a dangerous and unjustifiable interference with the citizen's personal rights and liberty, but a violation of the constitution of this state. *Burdick v. People*, 149 Ill. 600, *distinguished*.

Petition for a writ of *habeas corpus*. Heard before Judge Edward F. Dunne. The facts are stated in the opinion of the court.

Richard Prendergast, attorney for relators.

C. S. Deneen, state's attorney, and *W. S. Forrest*, attorneys for defendants.

DUNNE, J.:—

Relators have been indicted in the criminal court of Cook county charged with violation of section two of what is commonly called the "Anti-Scalper Act" approved April 19, 1875, in force July 1st, 1875. The section reads as follows: "That it shall not be lawful for any person not possessed of such authority (to-wit, a certificate of authority to sell tickets, passes, etc., attested by the corporate seal of the owner of a railroad or steamboat mentioned in the first section of the

act) so evidenced, to sell, barter or transfer for any consideration whatever, the whole or any part of any ticket or tickets, passes, or other evidence of the holder's title to travel on any railroad or steamboat. * * *"

In the case at bar these relators have filed a petition for *habeas corpus*, in which the indictments are attacked on the sole ground that the law in question is unconstitutional and void.

To arrive at a determination of this question, it becomes important upon the threshold of the inquiry to determine what is a "ticket, pass or other evidence of the holder's right to travel on any railroad or steamboat." Special counsel for the state and railway corporations expressly disavows the contention that "a railway ticket is not personal property" (p. 76 of his Brief) but in the next breath says that it is not "a vendible chattel," but something in which the lawful owner has "property rights." How a person can have property rights in that which is not property this court cannot conceive. The concession by counsel that the lawful owner has property rights in the ticket carries with it the admission that such a pass or ticket is property. But counsel argues it is not a vendible chattel. In what sense? If the law under consideration is a valid and constitutional law, counsel is correct, for the law itself makes such tickets non-vendible. This it but begging the question. Strike this law from the statute books or hold it unconstitutional. Does counsel contend, in the absence of such a law, that a railway ticket or pass entitling the holder to travel is not vendible or negotiable? If such is his position he has not sustained the same either by logical argument or sound legal precedent.

Prior to the passage of this act, tickets and passes entitling the holder to ride upon a railroad or steamboat in the state of Illinois were as vendible and negotiable as a check or note payable to bearer, a horse, a cow, or any other chattel. The very object and aim of the act was to deprive them of their vendibility and make their sale a criminal offense.

In the absence of this statute, a railway ticket or pass en-

titling the holder to ride was a something in which, as counsel for the state admits, the holder had property rights. One of these property rights, in the judgment of this court, was the right to sell it in the open market for the highest price. That property right is sought to be taken away from the holder by this law, for while it provides for the redemption of such a ticket it fixes an arbitrary price for the same and deprives the holder of the right to sell in market overt. Fixing an arbitrary price upon a man's property and compelling him to sell at that price, is as clearly a violation of property rights as taking it from him without compensation.

Section 2, art. 11, constitution of Illinois, declares that "no person shall be deprived of life, liberty or property without due process of law." The right to buy and sell merchandise, chattels and other articles of value in market overt and at private sale, is property. But it is contended by the state that under the maxim, "*Salus populi, suprema lex*" the state may in the exercise of police powers deprive the citizen of his property without compensation or legal procedure.

No lawyer will dispute this contention. Where the possession of property, or the retention of his personal liberty become a menace to the health, morals or general welfare of the community at large, the state may deprive the citizen of both or either.

But in all such cases, it must be clear that the law which deprives the citizen of his property or liberty is within the police powers of the state. In other words it must be a law passed for the protection of the health, morals or general welfare of the community at large. How is this question to be determined? What tribunal is to decide whether or not a statute falls within or without the police power of the state? In the first instance, undoubtedly, the legislature. The legislature primarily also determines whether a law is or is not constitutional, for it cannot be presumed that a legislature would enact legislation which it knew to be unconstitutional and therefore nugatory. Nor can it be presumed that a legislature would pass a law depriving citizens of their private

property without due process of law which would be unconstitutional unless it believed that in so doing it was exercising the police power of the state. In both cases the legislature primarily decides that the laws are constitutional and within the police power respectively.

Is the decision of the law-making power in either case final and decisive? Most certainly not. If such were the case, no laws could be held to be unconstitutional by the courts; nor could any court have the right to determine the question as to whether or not any given law fell within or without the police power of the state. It would suffice for the legislature to declare in the enactment—no matter what might be its scope or subject-matter—this law is passed in the exercise of the police power of the state, or this law is passed for the preservation of public morals.

This seems to be the position taken by special counsel for the state. He argues that the legislature of Illinois in its wisdom has determined that the law was necessary for the preservation and protection of public morals and for the prevention of fraud and that its enactment would secure both, and that no court has a right to go behind and examine this finding. That such is not the law is shown by the fact that able and industrious counsel and conscientious and painstaking judges have for years past been endeavoring to ascertain and determine the limits and scope of the police power of the state, and declaring whether enactments are within or without its scope, and are so far from defining exact limits to the police power, as are the arctic explorers from the north pole.

Prentice in his recent work upon Police Powers, plainly recognizes the right of a court to determine whether any specific enactment falls within or without the police power. On page 6 of that work in speaking of the police power which he terms a "law of necessity," he says: "The law of necessity has been stated to be an exception to all human ordinances and constitutions, yet has been frequently decided to be subject to the law of reason and subject to the control of the courts." Again on page 7 the same author cites with ap-

proval the statement of Chief Justice Taney in the *License Cases*,¹ "that this power of government (to-wit, police power) inherent in every sovereignty * * * is not an uncontrollable or despotic authority, subject to no limitation exercisable * * * at the whim of the legislative body." Again on page 9 of his work he recognizes the same right of the court when he says: "The limits (i. e. of the police power) are not yet reached while we still advance, but the underlying principles by which the reason or unreason, or the constitutional limits of the authority claimed or used, may be investigated or judged, are now fortunately less obscure."

The same author, in speaking of the right of a state to protect itself under the police power from the introduction within its limits of paupers, vagrants, criminals, etc., declares (p. 10): "Such a right can only arise from a vital necessity for its exercise and cannot be carried beyond the scope of that necessity." Further on in the same work, the author declares: "we also see these police powers themselves under limitation. Besides judgment of 'common right and reason,' they may be tried in our country under two Constitutions, that of the United States and that of the State in which the question is raised." Page 268.

In the case *In re Jacobs*, 98 N. Y. 98, 110, the court declares: "Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. * * * Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

Even counsel for the state at a different place in his very exhaustive printed argument, unguarded—it appears to the

¹ 5 How. 583.—Ed.

court—admits the right of the courts to determine whether or not a statute falls within the police power of the state when he quotes approvingly the following language used by Justice Field in the Powell case (*Powell v. Pennsylvania*, 127 U. S. 678): “If that which is forbidden is not injurious to the health or morals of the people, if it does not disturb peace and menace their safety, it derives no validity by calling it a police or health law.” When Justice Field used this language, he had under consideration and was endeavoring to determine whether or not a certain legislative act was within the police power of the state. If the legislature had the right conclusively and finally to determine that its legislation was within the police power of the state, why this language, and why Mr. Forrest’s commendation of the same.

This court is clearly of the opinion that when an act of the legislature, passed ostensibly in the exercise of the police power of the state, is submitted to a court for its construction in a proceeding in law or equity, that such court has a right to determine whether or not it is a legitimate exercise of the police power, particularly when, as in the case under consideration, the legislation in question has the effect of securing certain rights to one class of citizens and denying them to all other citizens, and diminishing the value of what was, prior to the passage of the act, legitimate, lawful and freely negotiable property.

Is the act in question a legitimate exercise of the police power of the state? If the provisions of the act carried out the intention expressed in the title or caption, it would unquestionably be within that power. An act whose provisions in fact dealt with and prevented “frauds upon travelers and owners of any railroad, steamboat, or other conveyance for the transportation of passengers” as declared in the title of the act, would clearly be a legitimate and proper exercise of the police power. Let us examine the act and ascertain what provisions it contains concerning frauds upon travelers or transportation companies. Sec. 1 provides that transportation companies shall provide all their ticket agents with writ-

ten certificates of agency attested by the corporate seal. Sec. 2 makes it unlawful for any person not having such certificates to sell—what? Bogus tickets? Forged tickets? Expired tickets? Tickets limited to a particular person? No; none of these. It makes it unlawful for any person not having such certificates of authority to sell “tickets, passes or other evidence of the holder’s title to travel” and these alone. In other words it makes it unlawful to sell a ticket good in the hands of any one who honestly acquired it and which, up to the time of the passage of the law, was a vendible, merchantable commodity. In what possible manner can the making of such articles as a ticket, good in the hands of its holder for a ride upon a railroad, unmerchantable and non-salable, tend to the prevention of fraud upon travelers? Does the sale of such a ticket injure the public health, if it be unaffected the fever germs or the public morals, unless upon it there appears what is unchaste and lascivious? Is it in any way inimical to the public welfare to have such a ticket sold by one citizen to another? After, and as the result of most careful deliberation, this court cannot conceive how the sale of a “ticket, pass or evidence of holder’s title to travel” even in the remotest degree injures the public health, morals, or public welfare. The language of Judge Allen in *Thomas v. Wabash R. R. Co.*, 40 Fed. 126, 133, is singularly appropriate to this law. Speaking of another law with a similarly deceptive title, he says: “The * * * act * * * has not only a false and deceitful title, but its purpose was to confer special privileges upon certain corporations and deny to others of the same class the exercise of the same rights. * * * The act is in conflict with the 22nd section of the fourth article of the constitution of Illinois. *Frye v. Partridge*, 82 Ill. 273; *People v. Cooper*, 83 Ill. 586; *People v. Meech*, 101 Ill. 200; *Millett v. People*, 117 Ill. 305, 7 N. E. 631; *Cooley’s Const. Lim.* 389-396.” To sustain such a law as the exercise of the police power would amount to striking out of our constitution the second and thirteenth sections of the Bill of Rights, and overthrow the last barrier between personal rights and corporate aggression.

But it is contended by counsel for the state and railway corporations that there is another ground aside from the claim that the law is a legitimate exercise of the police power upon which it must be held that the law is a valid and legal enactment, to-wit, that it is a law framed for the regulation of a business impressed with a public duty and performing certain quasi-public functions.

This contention has been pressed with great force and ability by counsel and is worthy of serious consideration. That corporations carrying on a business of quasi-public character, such as the operation of a railroad, ferries, canal, etc., are subject to legislative control and regulation, cannot be doubted, and if the law in question was passed for the purpose of, and did in fact control or regulate the management of railroads, steamboats and other means of transportation, it should be upheld by the courts.

Let us examine the law first in relation to the intention of the legislature, and second, as to the effect of the law with reference to the claim that it is a regulation of the business of transportation.

The legislature which passed the act probably knew the aim and intent of the act better than either court or counsel, and the aim and scope of legal enactment is always either generically or specifically set out in its title. Following the usual practice the legislature of Illinois declared the aim and scope of this act in its caption. It is there declared to be an act—not to regulate or control transportation companies, but an act “to prevent frauds upon travelers and owners of conveyances for the transportation of passengers.” In other words, the legislature enacting the law declares it to be an act passed in the interests of public morals to suppress fraud—a clear and unmistakable intent to exercise the police power. If it was intended to be a law for the regulation of transportation companies, the legislature would have so declared it in its title. It was clearly not the intention of the legislature to regulate transportation companies, and in sections two and three of the act, which are the vital sections thereof, and the sections under which relators have been indicted, no pretense

is made of regulating them. These sections do not apply in letter or spirit to transportation companies, but cover and apply to all citizens of the state in general, no matter whether they are engaged in the transportation business or any other business. It lays the heavy hand of law not only on ticket brokers, who are unconnected with transportation companies, but upon any and every citizen who having honestly come by a ticket entitling its holder to travel, honestly attempts to dispose of the same.

It would undoubtedly be an exercise of the right to control quasi-public corporations for a legislature to impose lawful conditions upon the original sale of a ticket by a transportation company to a purchaser, but once a ticket has issued entitling a "holder" to ride and therefore transferable by delivery, any legislation in reference to the future disposal thereof is not an exercise of the power to regulate and control corporations impressed with a public duty, but a bold and unwarranted interference with the property rights of citizens. The legislature has the undoubted right to control and regulate horse car companies. Yet if the legislature under the pretended exercise of this right should declare it to be a criminal offense for a horse dealer or other citizen to sell a horse which had been honestly acquired by purchase from the company, would counsel contend that such a law was constitutional? That he would not is shown by his own argument. On pages 49 and 50 of his brief in sustaining his position that the act is not in contravention of the Interstate Commerce Act, he declares: "A ticket offered for sale to or by a ticket broker is, when so offered, wholly separate and distinct from the function it performs in the hands of a traveler on a train and depending upon it as evidence of his right to transportation. It is, when so offered for sale, merged in the common mass of the vendible chattels in the state (if we consider it such a chattel) to the same extent as is any other article sold or offered to be sold by or to an inhabitant of the state. When so offered, even if we consider it a chattel, it is like, for instance, a piece of cloth bought from a merchant in

a foreign nation by Marshall Field or from an inhabitant of Illinois by Marshall Field, and by Marshall Field exposed for sale."

The court cannot state its view of the condition of a ticket "entitling holder to ride" after it has once been purchased from a transportation company and the holder thereof, in clearer language than has Mr. Forrest in the foregoing quotation. Sections 2 and 3 of this act under which relators are indicted do not regulate or control in any way transportation companies, and they cannot be sustained under the claim that they were enacted for the purpose of regulating corporations impressed with a public duty. They do, however, affect to control the whole body of the citizens of the state in imposing restrictions and limitations upon their right to buy and sell property. This the law-making power can only do in the legitimate exercise of the police power, and, as this court has theretofore declared, the law in question does not fall within the limits of the police-power.

In arriving at this conclusion, the court has not failed to examine and give full consideration to the cases cited by the counsel for the state, which declare similar laws valid and constitutional. The case of *Burdick v. People*, 149 Ill. 600, might in the absence of the extraordinary record disclosed in the majority and dissenting opinions in *In re Burdick*, 162 Ill. 48, be conclusive in favor of the state's position. But in view of the fact that the majority opinion in the latter case declares (p. 50) that, "Along with the petition, numerous affidavits were filed which tended to prove the truth of the statements made in said petition, that the petition upon its face discloses that the case of *Burdick v. People*, reported in 149 Ill. 600, was outrageously fraudulent and collusive, that the majority of the court did not find it necessary * * * to weigh the testimony * * * for the purpose of determining whether or not the prosecutions against George Burdick were fictitious and collusive," (p. 51), that the minority of the court did consider and weigh the evidence, and were of the opinion that the cases were fraudulent and collusive,

and that the majority opinion contains the singular and unusual declaration that the "opinion of the court in the Burdick cases are conclusive only as between the parties in those cases, and are no estoppel as between the people of the state of Illinois and the petitioners" (p. 58 of majority opinion); this court does not consider itself bound by the reasonings and conclusions in the opinion rendered in *Burdick v. People*. The opinion cited in *Commonwealth v. Wilson*, 14 Phila. 384, was rendered by a single judge—Ludlow—sitting in the court of quarter sessions. He holds that an enactment similar to the Illinois statute was within the police powers, but cites no authorities in support of his holding, the only authorities cited being in support of the position that a state may exercise its police powers notwithstanding that provision of the federal constitution giving to congress the right to regulate commerce between the states.

In *Fry v. State*, 63 Ind. 555, the supreme court of Indiana declared an act in some respects similar to the Illinois act a legitimate exercise of the police power and a valid law, although the title of the law, to-wit, "An act regulating the issuing and taking up of tickets and coupons of tickets by common carriers, and defining the rights of holders thereof, and other matters in relation thereto," and the provisions of the act regulating the same show that it was passed under the power of the state giving it the right to regulate quasi-public corporations impressed with public duties, rather than in the strict exercise of the police power. The Indiana act contains several regulations imposing restrictions upon transportation companies and favorable to the public, such as requiring restrictions upon the rights of ticket holders to be printed in nonpareil type and the redemption of tickets at each agency, and in these respects much more nearly approaches the legitimate exercise of the power to regulate municipal corporations than the Illinois law, and these considerations doubtless had their effect upon the court in passing upon the law in its entirety.

In *State v. Corbett*, 59 Minn. 345, the supreme court of

Minnesota, two of the five justices being absent, have also upheld a similar law as a valid exercise of the police power upon the authority of the Fry and Burdick cases, although the title of the act, to wit: "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," shows it was the intention of the legislature to regulate common carriers rather than to enforce police power in its strict sense.

The appellate division of the supreme court of New York has also recently, in the case of *People, ex rel. Tyroler v. Warden*, 26 App. Div. 228, 50 N. Y. S. 56,¹ following and relying on the Burdick, Corbett and Wilson cases, held a similar law in that state a legitimate exercise of the police power, and although the court has carefully considered the arguments and reasoning contained in the opinions rendered in those cases, it cannot arrive at the conclusion reached by those courts, that the sale of a ticket entitling the holder thereof to ride, by one citizen to another, tends in any way to injure the health, morals or general welfare of the community, and that legislation making such sales a criminal offense is an honest and legitimate exercise of the police power of the state. Until the supreme court of this state, upon a case presented to it by parties who are in fact, adversely interested in the outcome, shall declare such law within the police power of the state, this court holds to the view that this law, or any law which declares it a crime for one citizen to sell to another that which is not injurious to the public health, morals or general welfare, is not only a dangerous and unjustifiable interference with the citizen's personal right and liberty, but a violation of the constitution of this state. Nor in holding these views does this court stand alone. In *Austin v. Murray*, 16 Pick. 121, 126, it is said: "The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation." And Justice Field, in the celebrated *Slaughter House Cases*, 16 Wal-

¹*Burdick v. People*, 149 Ill. 600, distinguished.

lace, 36, says: "Under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment." And Judge Colt, in *Watertown v. Mayo*, 109 Mass. 315, 319, declares: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance, and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen."

In the language of the New York Court of Appeals, in *Re Jacobs*, 98 N. Y. 98, 115, which was also a *habeas corpus* case which called in question the constitutionality of a police law: "When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law the courts must be able to see that it has at least in fact some relation to the public health. * * * This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void. In reaching this conclusion we have not been unmindful that the power which courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution, and even with reluctance. But, as said by Chancellor Kent (1 Com. 450): 'It is only by the free exercise of this power that courts of justice are enabled to repel assaults and to protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights.'"

(The court remanded the relators, pursuant to the rule laid down by the state supreme court in *People v. Jonas*, 173 Ill. 316, that the constitutionality of a statute could not be considered in a *habeas corpus* proceeding.)

NOTE.

The above case is referred to in a note upon anti-ticket scalping laws in 4 L. R. A. (n. s.) 480, collecting the cases in the lower Illi-

nois courts holding the Illinois act unconstitutional. See, also, the other cases in this volume upon this subject. *People v. Walser*, 3 Ill. C. C. —; *People ex rel. Geis v. Pease*, 3 Ill. C. C. —; *People ex rel. Frank v. Pease*, 3 Ill. C. C. —; *People ex rel. Marks v. Pease*, 3 Ill. C. C. —; *People v. Ullman*, 3 Ill. C. C. —; *People v. Gilbert*, 3 Ill. C. C. 61.

The case of *Burdick v. People*, 149 Ill. 600, which many of the above cases refused to follow, was, however, cited with approval by the supreme court in *City of Chicago v. Oppenheim*, 229 Ill. 317, 319, 321 (1907); and in *Steele v. People*, 231 Ill. 340 (1907), where the state law prohibiting resales of theater tickets at an increased price was held unconstitutional and void.—Ed.

(Circuit Court of Cook County. In Chancery.)

Daggett

vs.

City of Chicago, et al.

(June 23, 1892.)

1. **PLATS—EFFECT OF PLATTING AND DEDICATION OF STREET BY STATE AGENCY.** By the platting of a subdivision and dedicating a street therein, the board of canal commissioners vested in the City of Chicago the title in fee of said street to be used as a public street for the benefit of the people at large.
2. **ABUTTING OWNERS—STANDING IN EQUITY TO PREVENT DIVERSION OF USE OF A STREET OR PARK.** An owner of property abutting upon a public street or park has a peculiar interest as such owner of property distinct from that of the public at large which entitles him to the aid of a court of equity to prevent the appropriation of such street or park to private uses or to any other public use distinct from that for which the same was dedicated.
3. **SAME—WHERE DIVERSION BENEFITS INSTEAD OF INJURES COMPLAINANT.** It is no defence to the bill of an abutting owner to prevent the diversion from its public use of a street or park upon which his land abuts, that such diversion will benefit instead of injure him.
4. **LACHES—NEGLECT TO COME PROMPTLY INTO COURT—ALLOWING DEFENDANT TO EXPEND LARGE AMOUNT OF MONEY.** When complainant has knowingly laid by and allowed the defendant to expend a large amount of money on a building in a public park as so authorized to do by the legislature he will be estopped in a court

of equity to insist upon an injunction to preserve such of his easements as he claims the building does or will interfere with, by his laches in not moving sooner.

5. INJUNCTION—DISCRETION OF COURT—BALANCE OF CONVENIENCE. The issuance or continuance of an injunction is to some extent a matter of discretion in the court and where the right infringed will create no irreparable injury or the injury is slight, that discretion is often exercised against the issuance of the writ. The court will balance the loss or inconvenience and if the issuing of the writ will cause much loss or inconvenience to the defendants, and but slight benefit to the complainant, it will refuse to use the court's strong arm to protect the complainant but will leave him to an action at law.
6. PARKS—PERSON IN POSSESSION UNDER VALID LEGISLATIVE ACT—PROVINCE OF COURT OF EQUITY—REMEDY FOR CONSEQUENTIAL DAMAGE. A party acting under legislative authority constitutionally exercised will not be interfered with in his possession at the suit of a private property owner who is consequently damaged by reason of such possession being taken and acts done under such legislative authority. It is not the province of a court of equity in such a case to interfere to thwart the legislative will, but the aggrieved party should be left to his remedy at law.
7. MUNICIPAL CORPORATIONS—PROPERTY HELD IN GOVERNMENTAL CAPACITY—CONTROL BY LEGISLATURE—POWER TO CHANGE USE. The legislature has full control over the streets and all the property of a municipality held in a governmental capacity and it has the power to change or alter the public use for which such property may be held in trust especially where such changed public use is of the same nature or kind.
8. PARKS—USE FOR PUBLIC PURPOSES—ERECTION OF ART GALLERIES. It is no perversion of the uses of a public park to erect a building therein devoted to art purposes filled with paintings and works of art designed to satisfy the aesthetic nature of the people who may visit the park.
9. SAME—CONTROL BY PRIVATE CORPORATION. The mere fact that an art gallery erected in a public park under the control of a private corporation, such corporation not being organized for pecuniary profit, does not detract from the public character of the erection where without cost to the city either in the original erection or the subsequent maintenance, the gallery is filled with art treasures and open to the public free of charge two full days each week together with holidays and Sundays.

Motion to dissolve or modify an injunction. Heard before Judges Tuley, Horton, Burroughs and Tuthill.

S. K. Dow & J. Burnham, for complainant.

John S. Miller, corporation counsel, for city of Chicago.

John P. Wilson, for Chicago Art Institute.

Edwin Walker, for World's Columbian Exposition.

TULEY, J. (HORTON and BURROUGHS, JJ., concurring):—

We can not enter into an extended discussion of the many points arising in this case, and shall only notice such as we deem necessary for the determination of the present motion.

It appears that in 1836 the Board of Canal Commissioners, representing the state of Illinois, made a subdivision of fractional section 15, east of State street, and between Madison and Twelfth. By the plat of said subdivision, the west line of Michigan avenue, from Madison street to Twelfth street, was fixed as it is at present found. The land lying between that west line and Lake Michigan, from Madison street to Park Row, just north of Twelfth street, was marked on the plat as "Michigan avenue." The meandering line of the Lake Shore made said plat of ground called Michigan avenue irregular in width, varying from less than ninety feet in width in front of Adams street, to about 200 feet at Park Row.

The first question that arises, is what title or interest did the municipality of Chicago take in said land, lying between the west line of Michigan avenue and the lake shore. By the act of the canal commissioners making such plat and dedication, the city became vested with the title in fee of said street marked "Michigan avenue," in trust, to be used as a public street for the benefit of the public at large. It holds such fee in its governmental capacity as a state agency. This is clearly so held in the case of the *City of Chicago v. Rumsey*, 87 Ill. 348; and *Zinc Company v. La Salle*, 117 Ill. 411; *Stack v. East St. Louis*, 85 Ill. 377; *Lloyd v. Mayor*, 5 N. Y. 369; *West Chicago Park Board v. McMullen*, 134 Ill. 170.

The city of Chicago subsequently made said street between Park row and Madison street, by ordinance, ninety feet in width, and improved it as such, and for more than twenty-five years last past has treated the original, and made the land

lying east of said ninety foot street, and between said street and the right of way of the Illinois Central Railroad (which said right of way was distant from the said west line of Michigan avenue 400 feet) as a public park or open common, commonly known as Lake Park or the Lake Front.

It appears from the evidence that in 1873, the city of Chicago permitted the erection upon said land east of said 90 foot street of the building known as the Interstate Exposition Building, in which building there has been up to the year 1892 annual industrial exhibitions, horse shows, concerts and various amusements permitted. The city has also allowed and permitted the occupation of a portion of it as a public armory, and at no time since that date has it been free from buildings.

In the summer of 1889, one Warren F. Leland, owning property at the corner of Jackson street abutting on said Michigan avenue, filed the bill in this case on behalf of himself, and all other property owners similarly situated, seeking to restrain the city of Chicago and the Interstate Industrial Exposition from permitting any person or corporation to erect a building for an electrical plant, or any other structure on the said land east of Michigan avenue, and from allowing or giving license to any person to take possession of and occupy any portion of said land, and that upon the hearing the injunction might be made perpetual, and that the Exposition building then upon said land should by mandatory injunction be decreed to be removed. A temporary injunction was granted upon the recommendation of a master according to the prayer of the bill, which injunction the defendants, the said Art Institute, and the said World's Columbian Exposition now seek to have modified so as to permit the erection by the Art Institute and said World's Columbian Exposition of a permanent art building on the site formerly occupied by the said Interstate Exposition Building. The present complainant, Sarah E. Daggett, shortly after the commencement of said suit, became a co-complainant, and during the present month the said World's Columbian Exposition and the said

Art Institute have become co-defendants and filed their answers herein. Numerous affidavits have been read in support of the bill, and also in support of the answers.

It appears that, in the year 1890, the project of holding a World's Fair in Chicago in the years 1892 and 1893, was started, and the congress of the United States, by act of April 25th, of that year, provided for the celebration of the 400th anniversary of the discovery of America by holding a world's fair at the city of Chicago, with power to the commission thereby appointed to accept such site as might be selected and offered by a corporation organized under the laws of the state of Illinois now known as the World's Columbian Exposition. It appears that the "World's Exposition of 1892," now the "World's Columbian Exposition," was incorporated under a general law of the state of Illinois, on the 9th of April, 1890, with power providing for the holding of the world's fair in the city of Chicago, and preparing a site and constructing the necessary improvements and buildings thereon. It further appears that in August, 1890, at a special session of the legislature of the state of Illinois, a special act was passed entitled "An act in relation to the World's Columbian Exposition," in which, among other things, the authorities having in charge the management of said World's Fair were authorized to use and occupy all of said lands or rights therein of the state of Illinois, whether submerged or otherwise, within the present limits of the city of Chicago, or adjacent thereto, which might be designated and selected by such authorities as the site for holding said world's fair. Authority was also given to fill and reclaim lands adjacent to any site so selected, such submerged lands so filled and reclaimed to be maintained as a public park after they ceased to be used for the purpose of such world's fair.

The act clearly gave the power to the authorities having in charge the world's fair, the corporate authority of the city of Chicago consenting thereto, to take possession of that portion of the land so dedicated in 1836 as Michigan avenue, lying east of the present Michigan avenue, and commonly known as the

Lake Park, or Lake Front, and of all submerged lands adjacent thereto that might be necessary for the purposes of the fair, the submerged lands which might be filled and reclaimed to remain a part of the said public ground without prejudice to any private rights therein as the same existed prior to the passage of the act. This act contained the following proviso: "That the buildings erected upon said public ground, or any enlargement thereof, may be removed and disposed of by the authorities erecting the same, within one year from and after the close of said exposition unless otherwise arranged and agreed between the corporate authorities of said city of Chicago, and the authorities who erected the same; and if the said city of Chicago shall agree to purchase said buildings, said authorities shall not ask or obtain from said city for said buildings a sum greater than the actual cost of building the same." The act also authorized a proceeding by the attorney-general or the state's attorney of Cook county, upon the request of the authorities having charge of the said World's Columbian Exposition to apply to a court, and have any right of easement or interest of the abutting property owners condemned and compensation made therefor under the act concerning the right of the exercise of eminent domain, but that no such private right or easement of property owners should be condemned for a longer term than five years.

It appears that on the 15th day of September, 1890, the World's Columbian Exposition made application to the corporate authorities of the city of Chicago for permission to use the said land so dedicated and known as the Lake Park and the submerged land adjacent thereto for the purposes of said world's fair, or Columbian Exposition, and an ordinance was passed by the city of Chicago, granting the use of said Lake Park, commonly called Lake Front, for the purposes of the world's fair. The Columbian Exposition subsequently determined that the main site of the world's fair should be Jackson Park, but that it would erect an art building upon said Lake Front. It appears thereupon the Art Institute of

Chicago, a corporation organized not for pecuniary profit, proposed to the Columbian Exposition to unite in the construction of an art building to be erected on said Lake Front north of Jackson street, which, after the fair, might remain as a permanent memorial art building, the World's Columbian Exposition paying \$200,000, which was the estimated cost of a temporary building, for that purpose, and the Art Institute providing the further sum of \$400,000, making the cost of the permanent building \$600,000. That the art building should be erected on the site then occupied by the "Interstate Industrial Exposition Building," which should be torn down and removed; the building so erected to be used by the World's Columbian Exposition for world's fair purposes, and to be under its control until the close of the world's fair. An agreement to that effect was entered into between the World's Columbian Exposition and the Art Institute, the Interstate Industrial Exposition consenting thereto.

At the time this proposition was made and accepted, it appears that the World's Columbian Exposition was in the possession and control of the Interstate Industrial Exposition Building, and of said Lake Park or Lake Front. It appears that on the 30th of March, 1891, the city of Chicago passed an ordinance, giving authority to the Art Institute of Chicago, to erect a permanent art building on the site of the former Interstate Exposition building, at its own cost, the title and ownership of the building to be vested in the city of Chicago, without any compensation being paid or allowed by the city to the World's Columbian Exposition, the Art Institute or any person or corporation therefor, and the use and occupation of said building when erected should be vested in the Art Institute of Chicago, and the objects for which the Art Institute was incorporated; that as soon as the World's Columbian Exposition should surrender the building, the Art Institute should transfer to the building, its museum, library and collections of art; that the exhibition halls of the building should be open to the public free of charge from nine o'clock till five o'clock on Wednesdays and Saturdays of each

week and on all legal and public holidays, and from one to five o'clock on each Sunday, and that all teachers and professors of the free public schools in said city of Chicago should be admitted to all the advantages afforded through its museum, library apparatus and collections or otherwise for study, research and investigation, free of any charge, the said art building to be managed, controlled, kept in repair, and carried on by said Art Institute without charge to the city of Chicago.

It appears that the officers of said Art Institute Association obtained the consent of all the owners of property abutting on said portion of Michigan avenue to the tearing down of the old exposition building and the erection thereon of the permanent art building, except the complainant, who owned a frontage of 65 feet in said half mile of frontage, and also one Stafford, who owned a reversion in a small lot after the expiration of a ninety-nine years' lease. The evidence tends to show that the officers and managers of said Art Institute were led to believe by the declarations of the husband of complainant (he assuming to act as her agent), that complainant would join with the other property owners and give such consent as they had done to the removal of the Interstate Exposition building and the erection of the art building. The removal of that exposition building was commenced about the month of November, 1891, and the contracts for the erection of the art building were entered into on the 4th of February, 1892.

It further appears that the complainant notified by letter, received on the 6th day of February, two days after the letting of said contracts, one of the directors of the said Art Institute, that she would not consent to the erection of a permanent art building upon said Lake Park, and that said director communicated such notice to the board of directors within a few days thereafter.

It appears by the evidence that no action was taken by complainant in court to prevent the continuation of the work being done by said Art Institute, by any motion, order, rule

for contempt or other proceeding until a large amount of money had been expended by said Art Institute; that the first action in court being taken by complainant on the 3d of April, 1892, by a rule to show cause made on the defendants therein why they should not be punished for contempt for violating the injunction of this court in proceeding to erect the said art building.

The evidence shows that complainant's property will not be damaged, but on the contrary will be largely benefited by the erection of said art building. We hold that an owner of property abutting upon Michigan avenue and this Lake Park has a peculiar interest as such owner of abutting property, distinct from that of the public at large, which entitled such owner to the aid of a court of equity to prevent the appropriation of such street or park to private uses, or to any other public use distinct from that for which the same was dedicated. That to a bill of such owner of abutting property, the defendants, whose acts are sought to be enjoined, can not defend upon the ground that their wrongful acts if they be such, will benefit instead of injure the complainant.

We hold that the evidence in this case tends to show some knowledge of the complainant of the acts of the defendants, the city of Chicago, the Art Institute, the Columbian Exposition and the Interstate Exposition, touching the removal of the old exposition building and the erection of said permanent art building, and that complainant has been guilty of *laches* in not moving sooner in court, so as to prevent the expenditure of money by the Art Institute. While such *laches* of complainant could not be held to be a waiver of any right to recover any damages that she may sustain as such abutting owner, it might be held to amount to an equitable estoppel upon her insisting upon the equity of an injunction against the Art Institute's further proceeding in the erection of the art building.

The issuing or continuing the writ of injunction is to some extent a matter of discretion of the court, and where the right infringed will create no irreparable injury, or the injury is

slight, that discretion is often exercised against the issuing of the writ of injunction. The court will balance the loss or inconvenience, and if the issuing of the writ will cause much loss or inconvenience to the defendants, and but slight to the complainant, it will refuse to use the court's strong arm to protect the complainant, but will leave him or her to an action of law.

The fact that the complainant has laid by and permitted the defendant, the Art Institute, to expend a large sum of money, which might have been prevented by diligent action of the complainant in court, should be a strong factor to determine the judgment of the court in the exercise of that discretion. We are not inclined to place our decision solely upon the question of *laches* of complainant.

The question arises in regard to the act of 1890, whether the legislature had the power to pass the act in question, and if the legislature had the power to authorize the Columbian Exposition with the consent of the city of Chicago, to take possession of this Lake Park, and use it for the public purposes of such world's fair, and for the purposes expressed in said act; and the defendants being in such possession and acting under the authority of the supreme court of the state, should a court of equity interfere with that possession by the issuing of its writ of injunction?

A party acting under legislative authority constitutionally exercised will not be interfered with in his possession at the suit of a private property owner who is only consequently damaged by reason of such possession being taken and acts done under such legislative authority. The only remedy of a party in such a case is a suit at law for damages. It is not the province of a court of equity to interfere by injunction in such cases and thereby thwart the legislative will. In this case the original dedication was as we have seen for a street. It appears that after the narrowing of the street to a width of ninety feet the property east of the street, which was there at the time of the dedication and that which has been added from time to time by natural accretion or artificial addition,

has been used and treated by the city of Chicago, as a public park known as the Lake Park, and has been recognized especially by the act of 1890 as a public park of the city of Chicago.

We deem the law to be well settled that the legislature has full control over the streets of a city and over all property of a municipality held by it in its governmental capacity, that is, property held like streets and public parks in trust for the public at large.

It may be that the legislature can not take away any easement of outlook or view, without providing for compensation for the easement so taken, or injured, to be made either by the state itself or by the city, but that it has the power to change or alter the public use for which such property may be held in trust, and especially where such changed public use is of the same nature or kind, there can be no question.

The question then recurs, whether or not the ordinance permitting the Art Institute through its arrangement with the Columbian Exposition, to erect the art building upon the site of the former Interstate Exposition building, can be justified, or is in conformity to the power conferred by the act of 1890 referred to.

The act of 1890 clearly contemplates the erection of buildings on the Lake Park by the Columbian Exposition Company, or under its authority, and provides for their removal within one year after the close of the exposition, unless otherwise arranged and agreed between the corporate authorities of said city of Chicago and the authorities who erected the same, and the act declares that "if said city of Chicago shall agree to purchase said building, the authorities shall not ask or obtain from said city for said buildings a sum greater than the actual cost of building the same."

Did the legislature by that act contemplate that buildings of a permanent character might be erected by the Columbian Exposition which the city of Chicago might desire to and should have the right to purchase at cost? It clearly appears that such was in the contemplation of the legislature.

If the city was to purchase a building or buildings at cost, for what purpose or use was it to be done? Certainly not for removal.

The intention clearly was that, if the city did purchase any building so erected, that such buildings were to remain in the park for public uses and purposes in connection with said park. It was certainly contemplated that greenhouses, herb-ariums, buildings for the horticultural exhibitions and art buildings would be erected by the World's Fair Company. Certainly an art building may be said to be a necessary concomitant to the carrying on of the World's Fair.

Is such a building in a public park a use of such park for public purposes or for park purposes? There can be no doubt of the power of the legislature to declare that this Lake Park should be for the education as well as for the physical enjoyment and recreation of the masses of the people. Are not such institutions as art galleries usually found in public places or public parks? Is it reasonable to urge that it is a perversion of the uses of a public park that there should be a building upon it devoted to art purposes, filled with paintings and works of art to delight the souls of the people who visit such parks? Are parks necessarily to be confined to the works of nature? Certainly this is a contracted view of the objects of public parks and should not prevail.

The power, it will be noticed, is given to the city to purchase the building so erected by or through the World's Columbian Exposition, and it is alleged that this was not a purchase by the city, but it will be observed that no time is fixed when such purchase shall be made, nor does the act require the consideration paid shall be in money. It is true that it is not, in probably the usual sense, a purchase, but the question is whether the arrangement made with the Art Institute by the city of Chicago comes within the spirit and scope of the act of 1890.

It is contended that the Art Institute is not a public organization, but is organized for private purposes. It is organized as a corporation, but not for pecuniary profit; it has

no stock. If this ordinance required the art building to be always open to the public, could it be said that it was not a public building, for the benefit of the public, although it might be under the management of the Art Institute corporation? Is the ordinance, or is it not, a reasonable exercise of the power of the city council, given by the act of 1890, to obtain for the benefit of the public a building erected by or under the authority of the Columbian Exposition? If the city can obtain for the use of the public such a building, for two full days each week and every Sunday afternoon and every legal holiday, free and clear of all charge to the public, filled with art treasures and without the expenditure of a dollar by the city, either for the erection of the building or for the paintings and works of art contained therein, and can have the same carried on, kept in repair, controlled and managed without the expenditure of any money on the part of the city, can it be said that such an arrangement does not come within the spirit and scope of the act of 1890? We think not. In our opinion, the art building to be erected, may be said to be public in its nature. The public, without cost to itself, obtains large benefits, free of charge, and the arrangement practically insures that such art building shall be managed, controlled and carried on in a manner probably better than the corporation itself could do, were it charged with so doing.

To hold that the action of the city and of the Columbian Exposition and Art Institute on the erection of the art building upon this Lake Park is authorized by the act of 1890 does not destroy or injure the park nor does it throw open the door to the city or other authorities or persons to erect other buildings or structures of any kind thereon. The only power of the city in connection with this art building is derived through the act of 1890, and can not be exercised, except in connection with the World's Columbian Exposition, or by its authority, so that there is no danger in this case of making a precedent by which the park may be lost to the public, or that private interests shall be enabled to obtain the erection of any buildings on said Lake Park.

Under the circumstances of this case, considering the *laches* of complainant, in enforcing any right she has to an injunction against the erection of this art building, that such delay has caused the Art Institute to expend a large sum of money, and that to now enforce this injunction against the Art Institute continuing the erection of said art building, such Art Institute will sustain a damage of nearly \$100,000, and also taking into consideration the fact that the Columbian Exposition and said Art Institute are in possession and acting under proper legislative authority, with the duly authorized consent of the city of Chicago, and also considering that the evidence shows that the complainant will suffer no substantial damages if this art building is permitted to be erected as provided for in said ordinance, and being persuaded that the proposed erection of the said building, under the city ordinance, is within the spirit and scope of the act of 1890, and authorized thereby we must hold that the complainant should be left to her remedy at law for her damages, if any is sustained, and that the injunction herein should be so modified as to permit the Art Institute and the Columbian Exposition to proceed with and complete said art building under said act of 1890, and the said ordinance of the city of Chicago.

Judge TULEY: Judge Tuthill dissents to this opinion.

Judge TUTHILL: I wish to simply say this: I passed upon this question in my former opinion. Of course, it is unnecessary for me to repeat the view which I then expressed, inasmuch as I had not changed my view. I find myself unable to agree with the majority of the court in the view they take of this act of 1890-1, and for several reasons.

In the first place, I do not find in that act any power given to the city to purchase. I think if such power had been given that the law would to that extent have been unconstitutional, as being in violation of this provision of the constitution. No act thereafter passed could embrace more than one subject, and that should be expressed. The subject of this law was

the World's Columbian Exposition, not the giving of power to the city to do anything. It seems to me that mention of the city, "that if the city should purchase," must be construed to mean that if the city had power or should thereafter be given the power to purchase an Art Institute, and if the city could, in a legal manner, that is, with the consent of the property holders, become the owner of a building upon the lake front.

It does not seem to me that the law of 1890 gives the city any such power or attempts to give it; and if it did attempt to give it, it seems to me it would be in violation of the constitution.

I say that, having those views, I wish to state that, in justice to myself, I find myself unable to agree either with the reasonings or the conclusions of the court.

Judge TULEY: It is proper to say that we do not agree with Judge Tuthill. We think that this act gives full authority to the city, and that it is constitutionally expressed.

The following order was entered by the court:

Upon the motions of the city of Chicago, the World's Columbian Exposition, and the Art Institute of Chicago, for a dissolution or modification of the injunction heretofore issued in said cause, and after hearing affidavits and evidence and arguments of counsel, the court being fully advised in the premises,

It is hereby ordered that said injunction be made, and the same is hereby so modified as not to interfere with the erection, construction and use of a building on the Lake Front, between Jackson and Monroe streets, in pursuance of, and as contemplated by an ordinance passed by the city council of the city of Chicago, on the 30th day of March, 1892, and of an act of the general assembly of the state of Illinois, entitled "An act in relation to the World's Columbian Exposition, approved Aug. 5, 1890," and of all contracts made in pursuance thereof.

(*Superior Court of Cook County. In Chancery.*)

The American Trust & Savings Bank

vs.

Imperial Hotel Company.

(February 14, 1896.)

1. **CONFLICT OF JURISDICTION BETWEEN COURTS OF CONCURRENT JURISDICTION.** In the case of conflicting jurisdiction, the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation and incidentally to take possession of or control over the subject matter of the suit. The court first invoked will not be interfered with by another court while the jurisdiction is retained.
2. **LIS PENDENS—ALL INDISPENSABLE PARTIES.** A *lis pendens* to be of controlling force in the question of jurisdiction would necessarily have to cover all indispensable parties.
3. **CONFLICT OF JURISDICTION—COMITY—COURT FIRST ACQUIRING SHOULD RETAIN.** Where a bill for a receiver was filed and thereafter other parties having notice of the pendency of such bill file a bill in another court on the following day for the appointment of a receiver of the same property and the defendant consents to the appointment of a receiver in the second suit, comity does not require that the court should relinquish jurisdiction in the first proceeding where it was evident that the second bill was filed for the purpose of forestalling any action in the first proceeding.

Bill for receiver. Heard before Judge Theodore Brentano. The facts are stated in the opinion.

Richard Prendergast and *H. S. Boutell*, for complainant.

Chas. H. Aldrich and *L. C. Collins*, for defendant.

BRENTANO, J.:—

I do not deem it necessary at this time to consider and pass upon the various propositions discussed by the eminent counsel for the Windermere Hotel Company, in the able and learned brief submitted on the motion before the court.

The main contention, it is admitted, is on the question of jurisdiction between this and the circuit court, and at the outset I desire to say that it is the steadfast purpose of this court

to avoid impinging on the jurisdiction of a court of concurrent jurisdiction.

It seems to me, as argued by counsel, that the question of jurisdiction must be determined by the facts and circumstances in the case, and from these determine in the light of the law, which court first acquired jurisdiction for it is conceded that the court first acquiring jurisdiction of the subject matter will retain it and administer the trust estate.

It is conceded that the bill in the suit at bar was filed on January 8th, and that the intention to file it, was communicated to and known by the parties most nearly concerned in, and to be affected by, the contemplated action of the complainants.

On the same day there was filed what purports to be an appearance by the law firm of which Mr. Defrees is a member. Of the effect of this appearance I will say no more than that it may be construed as an admission by him of knowledge that there was pending in this court a bill praying for the appointment of a receiver.

The affidavits also disclose that there was abundant ground to assume that complainant's application would be contested and resisted; and that for this reason notice was to be given and was given of the filing of this bill. Summons, however, was not issued under complainant's bill until January 15th.

On January 9th, (the day subsequent to the filing of this bill), Lyon filed his bill in the circuit court, summons at once issued and defendants were served on the same day, their appearance entered as also their consent to the appointment of a receiver; whereupon an order was entered appointing a receiver. A report of the receiver showing that the tenant in possession of the property had attorned to him was promptly filed, and as promptly confirmed, from which report it appears the Windermere Hotel Company made a lease for the term of ten years to the tenant in possession of the premises.

We have, therefore, a case where there was, at the time these orders were being entered in the circuit court for the

appointment of a receiver and in confirmation of his acts, a bill pending in this court which also asked for a receiver of the same property, and of which this court had jurisdiction and of which the complainants in the bill filed in the circuit court had notice.

From the records of the proceedings in the circuit court, on January 9, 1896, the conclusion is justified that the appointment of a receiver in that court was not discussed, but that the order appointing a receiver was consented to and was entirely perfunctory, so far as the Judge was concerned; that there was nothing in the proceedings before Judge Horton, advising him of the filing of the bill in this court, or that there were interested parties who might wish to be heard on the question of the appointment of a receiver under the bill in the circuit court.

The record discloses undue haste and precipitancy on the part of these defendants in rushing into the circuit court and there consenting to the appointment of a receiver, while they had notice of the pendency of this suit for a similar purpose; for, as was said by one of the eminent counsel on the argument, "both bills aim at possession of the same property." The same counsel argues that the circuit court has absolute jurisdiction on grounds of comity between courts of concurrent jurisdiction.

Conflicts between courts should ever be avoided and comity prevail, but it is a matter of grave doubt whether on the ground of comity alone, a court should relinquish jurisdiction and shrink from duties imposed upon it, where it finds that its jurisdiction is impinged upon. If this court concludes that it had acquired jurisdiction, it would be its duty to assert and maintain it, according to well-settled principles.

I think I am justified in thinking, from the affidavits and admissions made in court, that the proceedings in the circuit court were collusive and that the appointment of a receiver there, was procured for the purpose of forestalling any action by this court.

It seems to me, taking in consideration the fact that there

was collusion, that it may have some, if not controlling influence, upon the court in this case.

The eminent counsel for the Windermere Hotel Company, in his opening remarks, said that "mere consent to the appointment of a receiver in the circuit court, if in prejudice to complainants in this court, ought not to stand in the way of this court," which means, as I understand it, that if I find that this complainant was injuriously affected by the order of the circuit court that it would be the duty of this court to proceed to grant the prayer of this complainant and appoint a receiver.

It seems to me that the methods pursued by the parties to the circuit court litigation challenge the closest scrutiny and that the course there pursued can not persuade a court of equity to disregard the nature and effect of their acts. All there done was strictly in accordance with the forms of law, but will any one deny that it was not done for the purpose of forestalling the action of this court? Defendants proclaim that complainant can find ample protection by going into the circuit court and having the receivership extended over them and their claim. With equal force it is argued by complainants that defendants can have ample protection of their interests in the court whose aid was first invoked. In this case the doctrine of "*lis pendens*" has been invoked by defendants, but it would appear to me from an examination of the records in the above cases, that there was no "*lis pendens*" by reason of any proceedings in the circuit court, except against the parties served on January 9th, at the moment the American Trust & Savings Bank filed its application for a receiver in this court under the second mortgage. Service on the American Trust & Savings Bank in the circuit court suit was not made until January 20th, whereas the motion for a receiver was made in this court on January 15th. Even if there was a "*lis pendens*" as to some other party, by reason of the circuit court proceedings, there certainly was none on January 15th against the second mortgagee, the American Trust & Savings Bank, complainant in this court.

A "*lis pendens*" to be of controlling force in the question of jurisdiction would necessarily have to cover all indispensable parties. That a second mortgagee should be made a party, see 2 Jones on Mortgages, sec. 1425, and that he is an indispensable party, see *Augustine v. Doud*, 1 Ill. App. 588.

As to the question of which court first acquired jurisdiction, I am satisfied to rest upon what Judge Blodgett said in *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197, and concurred in by Judge Drummond.

"It will hardly be necessary to cite authorities to show that it is, and has long been, the settled rule of law in all cases of conflict of jurisdiction, that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the *res*, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction.¹ The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure, for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property; and while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained." See also, *Gaylord v. Ft. W. M. & C. R. R.*, 6 Bissell, 286.

The question of jurisdiction out of the way, in my view of the law, if the allegations contained in this bill are true, the complainants would be entitled to have a receiver appointed, and in order to fully determine this, and to establish the re-

¹ *Bell v. Ohio, L. & T. Co.*, 1 Biss. 260; *Riggs v. Johnson County*, 6 Wall. 166; *Bill v. New Albany, etc. R. R.*, 2 Biss. 390; Abbott's U. S. Practice, 223, and cases cited.—Ed.

lationship of all parties to the subject-matter, there should be reference to a master to hear evidence and report the same with his conclusions. I am of the opinion that the bill contains sufficient allegations of fact to justify the court in ordering a reference.

And counsel for defendant seems to admit that if this court should conclude to assert jurisdiction in this matter, and not to direct complainants to seek relief before the other tribunal, that a reference would have more than "academic interest," and in such an event, to submit to and invite the fullest disclosure of the affairs of the Windermere Hotel Company, and Mr. Defrees' relations thereto.

I am of the opinion that the proper thing to do at this time, in view of all that is before the court, is to order a reference of both motions, with directions to the master to hear evidence and report the same to the court.

An order of reference may be prepared.

NOTE. Upon the question of priority of jurisdiction between state and federal courts in case of conflict see *Rodgers v. Pitt*, 96 Fed. 668, where the authorities are reviewed.—Ed.

(Circuit Court of Cook County.)

People ex rel. A. S. Whitman

vs.

John Shea and Henry C. Jones.

(December, 1894.)

1. **HABEAS CORPUS—FUGITIVE FROM JUSTICE—EXTRADITION—INQUIRY AS TO COMMISSION OF CRIME.** It is not permissible on the trial of the habeas corpus case brought on behalf of an alleged fugitive from justice to consider whether or not a crime has in fact been committed in the state asking the return of the prisoner.
2. **SAME—GOOD FAITH OF PROSECUTION.** It is not proper in a habeas corpus proceedings brought to try the legality of restraint of a person alleged to be a fugitive from justice to inquire into the good faith of the prosecution in the state asking his return.

3. SAME—DUTY OF GOVERNOR—SUFFICIENCY OF EXTRADITION PAPERS—PROVINCE OF COURTS. If the indictment or affidavit upon which the requisition is based does not show upon its face that a crime is *charged* against the alleged fugitive the executive should not act thereon, and if he do so improvidently or mistakenly, it is unquestionably within the power of the court to consider the affidavit and warrant submitted to the executive and pass judicially upon their sufficiency and if insufficient order the release of the prisoner.
4. CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENCES—NATURE OF OFFENSE. The offense of "obtaining money under false pretenses" was not a common law offense but is of purely statutory origin.
5. SAME—ALLEGATIONS NECESSARY TO CHARGE OFFENSE. To hold a person charged with having committed the ordinary statutory crime of "obtaining money under false pretenses" as a fugitive from justice there must be allegations showing that there was a fraudulent statement of *existing facts*, a knowledge on the part of the defendant of their false and fraudulent character, an intent to deceive and defraud, and an obtaining of the money and the property of another thereby; the mere allegation that the defendant has committed against the law of the demanding state the crime of obtaining money by false pretenses is insufficient.
6. PRACTICE—AMENDING INSUFFICIENT HABEAS CORPUS RETURN TO SHOW ALLEGED FUGITIVE ACTUALLY CHARGED WITH CRIME IN DEMANDING STATE. Where the return to a writ of habeas corpus to obtain the discharge of a person arrested as a fugitive from justice, is insufficient to show that he is charged with a crime in the demanding state the court will allow the defendants in the habeas corpus proceedings to amend their return to show that he is, if such be the fact.
7. HABEAS CORPUS—FUGITIVE FROM JUSTICE—GOVERNOR'S WARRANT—WHAT SHOWS REGULAR AFFIDAVIT IN DEMANDING STATE. A recital in the governor's warrant that there was produced and laid before him a copy of a warrant and affidavit made by and before *a properly empowered officer in and of the State of North Carolina in accordance with the laws thereof* is sufficient to show that the affidavit upon which the North Carolina warrant was issued was made by a duly authorized official in the course of a judicial proceeding.

Petition for discharge on habeas corpus. Heard before Judge Edward F. Dunne. The facts are stated in the opinion.

W. E. Mason and Joseph T. Kretzinger, attorneys for relator.

F. A. Dennison, attorney for defendants.

DUNNE, J.:—

Relator Whitman has filed in this court his petition for release, under the Habeas Corpus Act, alleging therein that he is illegally restrained of his liberty by the defendants. The defendants in their return deny that defendant Shea has custody of the relator, but admit that defendant Jones has such custody, and aver that he, Jones, as agent of the governor of North Carolina, rightfully and lawfully detains the prisoner by virtue of a warrant of the governor of Illinois, issued upon the requisition of the governor of North Carolina; said warrant containing the following recital:—

“The executive authority of the state of North Carolina demands of me the apprehension and delivery of A. S. Whitman, represented to be a fugitive from justice; and has moreover produced and laid before me the copy of a warrant and affidavits, made by and before a properly empowered officer in and of the said state in accordance with the laws thereof, charging A. S. Whitman, the person so demanded, with having committed against the laws of said state *the crime of obtaining money under false pretenses*; which appears by the said copy of a warrant and affidavit certified as authentic by the governor of said state, now on file in the office of the secretary of the state of Illinois; and being satisfied that the said A. S. Whitman is a fugitive from justice and has fled from the state of North Carolina, etc.”

After this recital the apprehension and delivery of the said Whitman is ordered. Relator demurs to this return and asks his discharge on the following grounds: 1st. That no crime was in fact committed in the state of North Carolina. 2nd. That the recital of the alleged crime contained in the warrant of the governor of Illinois does not, upon its face, show that the relator was *charged* in the affidavit with the commission of a crime known to the law of either state. 3rd. That the

warrant of the governor of Illinois does not, in its recital, show that the affidavit upon which the North Carolina warrant for the relator's arrest was made before a legally authorized officer in the course of a judicial proceeding.

In view of the serious charges made by counsel for the relator, affecting the *bona fides* of the prosecution, the court *in limine* has heard certain oral testimony. In substance the testimony disclosed the following state of facts:

The relator was a member of a Chicago firm having a bank account in a Chicago bank which ranged from sixteen thousand dollars to a few dollars. At no time within thirty days prior to the commission of the alleged crime, did relator or his firm have over two hundred dollars on deposit.

On the day of, 1894, the relator presented a letter of introduction from one Hayes, a resident of Chicago, to a mercantile firm in North Carolina, on the faith of which relator succeeded in getting this firm to cash his check for \$1,970 upon the Chicago bank. Upon the presentation of the check it was marked "insufficient funds" and dishonored, there being on deposit on the day of presentation only two dollars, or thereabout.

Upon the return to North Carolina of the dishonored check, the North Carolina firm telegraphed Hayes, who promptly made good the loss sustained by the North Carolina firm and requested it, by telegram, to swear out a warrant for the arrest of the relator for obtaining money under false pretenses.

Such proceedings were taken and were the basis for the issuance of the warrant for relator's arrest by the governor of Illinois.

Pending the requisition from North Carolina the relator was arrested on a fugitive warrant issued by a justice of the peace of Cook county upon the affidavit of Hayes, and either paid or indemnified Hayes against loss. Under this state of facts it was strenuously contended by the relator that the prosecution in North Carolina was not in good faith, inasmuch as it was instigated by Hayes for the collection of a debt; and would be futile if in good faith, for the reason that

one essential element of the evidence for the prosecution, to-wit, the condition of the relator's bank account in the Chicago bank, could only be proved by the officers of the bank who were beyond the reach of the North Carolina court, and flatly refused to concern themselves with the prosecution.

If, under the law, it were permissible on the trial of a *habeas corpus* case to inquire into the question as to whether or not a crime had in fact been committed in North Carolina, or to examine into the *bona fides* of a criminal prosecution entered into in another state, the evidence offered in this case would tend to move the court to discharge the prisoner from custody. This consideration has induced the court to carefully examine the authorities in point. Such examination has brought the court to the conclusion that on the trial of a *habeas corpus* case the court has not the right to consider the question as to whether or not a crime has in fact been committed in another state. Nor has it the right to examine into the good faith of the prosecution.

The authorities almost unanimously hold as an elementary principle that a person accused of a crime must be tried in the state where the offense was committed; and that to inquire into his guilt or innocence where the offense was not committed, is in derogation of all the principles of common and statutory law. That must be left to the court of the state where the crime is alleged to have been committed. *In re Greenough*, 31 Vt. 279; *In re Clark*, 9 Wend. 212; *Kingsbury's Case*, 106 Mass. 223.

On *habeas corpus* a court or judge before whom a prisoner is brought, arrested as a fugitive from justice, by a warrant issued by the executive of another state, will not inquire into the probable guilt of the accused. *Davis's Case*, 122 Mass. 324; *People v. Pinkerton*, 77 N. Y. 245; *Norris v. State*, 25 Ohio St. 217; Sedgwick on Constitutional Law, 395; Hurd on Habeas Corpus, secs. 327-388; Cooley's Constitutional Law, 16.

If upon the hearing of a *habeas corpus* case a court cannot inquire into the fact, as to whether a crime has in fact been

committed, as the above authorities establish, it necessarily follows that the good faith of the prosecution is not within the range of inquiry.

If the paramount question of the guilt or innocence of the relator cannot be inquired into, it would be idle formality to investigate a collateral issue such as the motives of the prosecution.

The second objection to the defendants' return, made by the relator in this case, presents, however, a more serious question.

Does the governor's warrant show upon its face that the relator has been charged with the commission of a crime? If it does not, this court is of the opinion that the relator should be discharged unless further proof is adduced that the relator was in fact charged with such crimes.

Counsel for the defendants has contended that "a regular demand under the act of congress, and warrant of the governor to surrender a fugitive, is conclusive; and the court or judge cannot, on *habeas corpus* inquire further into the offense charged." Citing in support of this contention, *Adams v. Buzine*, 4 Harrington (Del.), 572.

Counsel's position, in other words is, that if the warrant is duly issued, the court upon *habeas corpus* can go behind it only so far as to entertain the question as to the identity of the alleged fugitive.

This position he claims is supported by the following authorities: *State v. Schlemn*, 4 Harrington (Del.), 577; *Commonwealth v. Daniels*, 6 Pa. Law Journal (4 Clark), 417; *In re Clark*, 9 Wend. 218.

The best considered cases, in the opinion of this court, do not support this contention of counsel.

In the matter of *Peter B. Manchester*, 5 Cal. 237, MURRAY, Chief Justice, in delivering the opinion of the court, says:

"It may be as well to state, *in limine*, that I do not consider, under the distribution of powers by the constitution of this state, the judiciary are denied jurisdiction in this class of cases. The very object of the *habeas corpus* was to reach

just such cases; and while the courts of the state possess no power to control the executive discretion, and compel a surrender, yet, *having once acted, that discretion may be examined into, in every case where the liberty of the subject is involved.*

“The extradition of the subject is a dangerous power, which cannot be too carefully watched, and ought not to be trusted alone to the executive. * * *”

In re Roberts, 24 Fed. 132, Speer, Justice, held that “while the duty of the executive is thus plainly marked out, it is also the province of the courts on inquiry, by means of *habeas corpus*, to determine the legality of the detention of the party whose extradition is sought.”

In People v. Brady, 56 N. Y. 182, 188, the court, in passing on a state of facts almost identically the same as these presented in the case at bar, declares, that “It does not appear that an indictment has been found against the relator; and the question arises whether the affidavits charge him with the commission of a crime in the state of Michigan; for unless this appears, they are fatally defective, and the warrant for his rendition was unauthorized.”

In re Doo Woon, 18 Fed. 898, the court makes use of the following language:

“The executive of this state, in allowing the requisition of the executive of California, acts under the authority of the United States statute, and must conform to its directions and limitations. *Kentucky v. Dennison*, 24 How. 66. One of these is that before he can allow a warrant of extradition he must be furnished with a copy of an indictment or affidavit charging the person demanded with the commission of a crime against the laws of California. Without this he has no jurisdiction. A case for the exercise of his authority, in this respect, is not presented, and so far does not exist. And the warrant must bear upon its face the evidence that it was duly issued, and therefore, unless it recites or sets forth the indictment or affidavit upon which it is founded, it is illegal and void.”

As is indicated by the authorities just cited, it is undoubtedly the province of the court or judge, on the trial of a *habeas corpus* case, to examine into and consider the extradition papers and the indictment or affidavit and warrant upon which the same is based.

The executive in issuing a warrant upon the requisition of the governor of another state, acts in a ministerial and not in a judicial capacity.

If the law governing requisitions and extradition has not been strictly complied with, the governor should not issue his warrant for the apprehension of an alleged fugitive. If the indictment or affidavit upon which the requisition is based does not show upon its face that a crime is *charged* against the alleged fugitive, the executive should not act thereon, and if he do so, improvidently or mistakenly, it is unquestionably within the power of a court to consider the indictment or affidavit and warrant submitted to the executive and pass judicially upon their sufficiency. And if they be found invalid or defective, it should order the release of the prisoner.

Holding this view of the law, the court, in the case at bar, has carefully considered the recital in the governor's warrant, which is made a part of the return. The recital in the said warrant, setting out the offense, is in the following words:

"With having committed against the laws of the state of North Carolina, the crime of obtaining money under false pretences."

Does or does not this allegation describe or set out a crime? This court is of the opinion that it does not.

The offense colloquially, but inaccurately, known as "obtaining money under false pretences" was unknown to the common law. It is purely a statutory crime created for the first time by an act passed in the reign of George II.

Cheats were punishable at common law it is true, but the cheats punishable at common law are such cheats as are effected by deceitful or illegal symbols or tokens, which may affect the public at large, and against which common pru-

dence could not have guarded. Wharton, Crim. Law, Vol. II, sec. 1116.

Obtaining money on one's own check or note is not such a cheat. Wharton in his valuable work considers this express question, and uses the following language:

"In the case of a person offering to another a cheque on a bank where he has no funds, neither of these ingredients, (to-wit, latency and publicity) exists. The fraud is not so latent as not to call up inquiry, for the very fact of a man offering his own paper is notice putting the person to whom the paper is offered on his guard. The fraud is not addressed to the public at large, but only to the person invited to take the cheque. Hence, passing such a cheque on an individual is not a cheat at common law." Wharton, Crim. Law, Vol. II, sec. 1223.

Again the same writer declares:

"No cheat is indictable at common law unless effected by conspiracy, or unless it be marked by latency, subtlety, and generality of operation, as to affect all likely to come within its range; whereas, under the statutes now before us (covering the obtaining of money or goods by false pretences) it is made indictable to obtain money or goods from individuals by any designedly false statements of facts likely, under the particular circumstances of the case, to deceive." Wharton, Crim. Law, Vol. II, sec. 1130.

Obtaining money under false pretences not being an offense at common law, such as murder, arson, burglary, forgery, rape or larceny, but being a crime created by statute, it follows that on the face of an affidavit or indictment upon which it is sought to apprehend a fugitive from justice, sufficient must appear to show that the fugitive is charged with the *statutory* crime.

In other words, the indictment or affidavit must disclose all of the essential elements of the statutory offense.

The legislatures of North Carolina, as well as those of Illinois and most of the other states of the union, have, following the precedent of the English statute of 30 Geo. II, c. 24,

enacted laws which declare that the obtaining of money or goods by false pretenses, under certain conditions and circumstances, is a criminal offense. In each and all of these acts there is an express statutory definition of the offense, and in order to constitute the same each and all of the elements of the statutory crime mentioned in the statute must be found in each particular case where the crime is charged, before the person charged therewith can be apprehended on a warrant or indicted.

The words "obtaining money under false pretenses" do not disclose an offense as defined by the North Carolina or Illinois statute. All false pretenses are not illegal, nor is the obtaining of money or goods by illegal false pretenses at all times a crime; as for example, the collection of an honest debt from a debtor by means of false pretenses.

Under most, if not all of the statutes of the several states examined by the court, there are four essentials requisite to the commission of the offense of obtaining money by false pretenses:

- 1st. False and fraudulent statement of *existing facts*.
- 2nd. Knowledge of their false and fraudulent character.
- 3rd. Intention to deceive and defraud.
- 4th. Obtaining the money and property of another thereby.

To constitute the crime of obtaining money or goods under false pretenses, there must be a "false and fraudulent representation or statement of an existing or past fact, made with knowledge of its falsity, and with the intent to deceive and defraud," whereby another is induced "to part with money or property of value." Vol. 7, Amer. & Eng. Ency. of Law, 700 (1st ed.).

In *People ex rel. Lawrence v. Brady*, 56 N. Y. 182, 188, an affidavit similar to the recital contained in the governor's warrant in this case, after exhaustive argument, was held insufficient, but one judge dissenting, and the court uses the following language:

"The false pretenses are not set out, nor the means by which the cheat was to have been, or was effected. It was in

the power of the complainant to have specified the pretenses and means used, for he alleges that the object of the conspiracy was accomplished. In an indictment for a cheat at common law the false token must be alleged; and in an indictment for false pretenses the pretenses must be averred, so that the accused may be prepared to meet the accusation, and that the court may see that an indictable offense is charged; for there are many cheats which are not indictable, and false pretenses which are not within the statute. (2 Term Rep. 586; East's Crown Law, 837; *People v. Williams*, 4 Hill, 9; *People v. Crissie*, 4 Denio, 529.) An allegation that one obtained the goods of another by false pretenses, or by cheating, is not, in a legal sense, a charge of crime, for it may be true, and yet no crime may have been committed."

The court is, therefore, of the opinion that the recital in the governor's warrant did not set out or charge, by way of recital or direct averment, the commission of a crime.

Counsel for the defendants, however, have moved this court for leave to supplement their return and file in connection therewith, the affidavit and warrant filed in the office of the secretary of state, upon which the governor of Illinois issued the warrant set up in the return.

This motion has been allowed, as was the same motion granted in the case *In re Romaine*, 23 California, 585.

And there now being on file in this case a copy of the affidavit upon which the North Carolina warrant was issued; and this affidavit setting out in detail, in conformity with the law, the false pretenses upon which the governor of Illinois has issued his warrant, the court is of the opinion that all the requirements antecedent to the issuance of the governor's warrant have been fully complied with, and that the prisoner must therefore be remanded to the defendant Jones, who has been duly appointed the agent of the governor of North Carolina.

As to the third objection made by counsel for the prisoner to the sufficiency of the governor's warrant, to-wit: That it does not appear on the face of the papers that the affidavit

upon which the North Carolina warrant was issued, was made by a duly authorized officer in the course of a judicial proceeding, it suffices to say that the governor's warrant recites that there was produced and laid before him a copy of a warrant and affidavit made by and before a *properly empowered officer in and of the state of North Carolina in accordance with the laws thereof*. This recital is, in the opinion of the court, ample and complete.

The order of this court is, therefore, that the relator be remanded to the custody of the defendant Jones, the agent of the governor of North Carolina; and it is so ordered.

(Municipal Court of Chicago. First District.)

Equitable Mutual Fire Insurance Company, a corporation,

vs.

A. L. McCrea.

(February, 1908.)

1. **FIRE INSURANCE—FOREIGN INSURANCE CORPORATIONS—EFFECT OF SURPLUS LINE ACT OF 1903.** The law of 1903, in relation to the placing of surplus line insurance with foreign insurance corporations not licensed to do business in the state, not merely permits the agent to act when the conditions provided by the law exist and procure a policy from the unauthorized company but sanctions the issuance of the policy in this state by which the transaction is completed. Thus, all claims arising out of such a policy are enforceable in this state not only by one but by all the parties to it.
2. **PRINCIPAL AND AGENT—DUTY OF AGENT IN REGARD TO MONEY RECEIVED ON BEHALF OF PRINCIPAL WHICH HAS ARISEN OUT OF ILLEGAL TRANSACTIONS.** An agent who has received money on behalf of his principal cannot defend against an action brought by the principal to recover such money by setting up that the transaction out of which it arose was illegal.
3. **MAXIMS—IN PARI DELICTO—MEANING.** The maxim *in pari delicto* does not mean that parties cannot recover who are both guilty but such as are guilty in equal degree.

Motion for new trial. Case No. 752. Heard before Judge Max Eberhardt. The facts are stated in the opinion.

Frederick A. Brown, for plaintiff.

Ossian Cameron, for defendant.

EBERHARDT, J.:—

This case is pending in this court on a motion for a new trial. The plaintiff obtained a verdict for \$2,688.25, representing the amount of premiums collected by the defendant as the agent of the plaintiff, an insurance company organized and doing business under the laws of the Dominion of Canada and which amount the defendant had failed to pay over to said company. The policies were issued by the plaintiff in the course of what is commonly known as the surplus line business, and apparently under and in compliance with an act passed by our general assembly on, etc., and entitled "An act providing for licenses to agents to procure fire policies in unauthorized corporations, providing for a bond to be given by such agents, and for a tax upon the receipts of premiums received for policies so issued within the state."

The motion, which, according to the last attitude taken by counsel for the defendant, is virtually a motion to set aside the verdict of the jury and dismiss the case—is urged upon the principal ground that notwithstanding the act in question, the plaintiff's claim is based upon, or grows out of, an illegal transaction or a contract made invalid and inhibited by the laws of the state of Illinois. It is contended with much emphasis and vigor by the defense, that the plaintiff in issuing its policies and having a recognized agent, the defendant, in the state of Illinois, the business done comes within the provisions and the inhibition of the general insurance law of the state, and not having previously complied with these provisions, the plaintiff has no standing in this court and cannot recover.

It is further urged on behalf of the defense, that the business done and the policies issued by the plaintiff are not rendered lawful by the act of 1903, and do not take the plain-

tiff's case out of the operation of the previous act passed by our legislature regulating the conduct and providing for the admission into this state of so-called outside or foreign insurance companies for the purpose of doing a general insurance business. It is said that the Act of 1903 simply provides that citizens of this state may on certain conditions obtain a license to act as agents, and that they, after diligent effort by them made to obtain sufficient insurance from authorized companies, may procure surplus insurance from such companies as are by the general insurance law prohibited from doing business in this state; and that such agents, when they procure such surplus insurance for another, are the agents of the insured and can do no act whereby the insurance company itself can be exempted from the inhibition of the statute, inasmuch as they carry on the insurance business, with an established agency, in this state. Although the policies issued and the contracts made may, by the insured, be enforceable in Canada, they are, when made in contravention of our law, not enforceable by the insured in the courts of this state whose laws may have been violated and set at defiance.

The proposition that the general insurance law, before the act of 1903, renders invalid all contracts made and business done in this state by outside insurance companies not complying with the provisions of the law and the conditions the law imposes upon them, and the force and general application of the long line of cases cited by defendant in support of his contention, is conceded.

But let us see whether the construction applied by the defense to the act of 1903 is correct, and whether the proposition holds good that all contracts made by the plaintiff are unlawful and not enforceable in this state, notwithstanding the provisions of this act, permitting so-called surplus insurance by outside or unauthorized companies.

It is necessary for the purpose of this inquiry to quote the act in full.

"An act providing for licenses to agents to procure fire

policies in unauthorized corporations, providing for a bond to be given by such agents, and for a tax upon the receipts of premiums received for policies so issued within the state. (Approved May 14, 1903. In force July 1, 1903. L. 1903, p. 221; Legal News Ed. p. 182.)

"80h. *License to agents to procure fire policies in unauthorized corporations—Account kept—Bond*). Sec. 1. *Be it enacted by the people of the state of Illinois* represented in the general assembly. That the superintendent of insurance, in consideration of the yearly payment of two hundred dollars, except in counties having less than one hundred thousand inhabitants, in which case the fee shall not exceed twenty-five dollars, may issue to citizens of this state a license, revocable at any time, permitting the party named in such license to act as agents to procure policies of fire insurance from corporations, persons, partnerships and associations which are not authorized to do business in this state. Before any insurance shall be procured under or by virtue of said license, there shall be executed by the licensed agent an affidavit, which shall be filed in the insurance department of this state within thirty days after the procuring of such insurance. Such affidavits shall set forth that the licensed agent is after diligent effort, unable to procure the amount of insurance required to protect the property described in said affidavit, from the insurance corporations duly authorized and licensed to transact in this state.

"The agent procuring policies in such unauthorized corporations or with persons, partnerships and associations, shall keep a separate account thereof, open at all times to the inspection of the insurance superintendent, showing first, the amount of such insurance placed for any party; second, the gross premiums charged thereon; third, in what corporation or with what persons, partnerships or associations the insurance is placed; fourth, the date of the policy; fifth, the term thereof, and sixth, the cities, towns and villages in which the insured property is located. Each party receiving such license shall, before transacting business thereunder, execute

and deliver to the superintendent a bond to the people of the state, in the penal sum of two thousand dollars, with such sureties as the superintendent shall approve, conditioned that the said agent will faithfully comply with all the requirements of this act and will pay to the insurance superintendent of the state of Illinois, for the use and benefit of said state, a sum equal to two (2) per cent upon the amount of the gross premiums received from policy holders upon all policies procured by him or issued by him during the preceding six months pursuant to this act, and in default of the payment to said insurance superintendent of any sum to which he is entitled under this act, he, the said insurance superintendent, may sue for the same in any court of record in this state." (Hurd's R. S., 1905, p. 1187.)

Under the act, the right of the agent who is unable after diligent effort to obtain sufficient insurance from companies authorized to do a general insurance business in the state, to procure so-called surplus insurance from an outside or unauthorized company, is unquestioned. It will at once become apparent that it could not have been the intention of the legislature to authorize a citizen of this state, who for the purposes of the law is called an agent, to procure that which is condemned as illegal and upon which the law has placed its ban. It is surplus insurance which may be procured. Can it be procured without the making of a contract binding upon the parties? Without the issuing of a policy by the insurer, the acceptance of such policy and the payment of the premium by the insured?

It does not require more than a mere reference to the most elementary principles of the law to show that this is impossible. But it is not only impossible in the law; it is also impossible in actual practice. If an agent desires to procure surplus insurance from an outside insurance company, that company would certainly not be willing to make that insurance except under a contract valid to all intents and purposes in the state where the law permits such insurance to be procured.

Would such insurance company issue its policies to be delivered by the agent to the insured, permit him to collect—the only thing practical in this instance—the premium from the insured upon the delivery of the policies, and thus in law making the agent its agent, without a right of action in this state to compel the agent to account for the premiums thus received?

It is not reasonable and consistent with logic to contend that the law permits only certain acts of the agent without at the same time sanctioning the entire transaction, in other words, a contract towards whose execution and procuring the acts of the agent are expressly authorized by the very terms of the law. Then, again, the act requires, among other things, the payment to the state of an amount equivalent to two per cent of the premiums collected by the agent. This is not in the nature of a forfeiture or confiscation of proceeds, in whole or in part, gotten from an illegal transaction or from a contract under the ban of the law; it is a tax levied by the state upon what it recognizes as property involving a property right. Taxes are defined to be burdens or charges imposed by the legislative power upon person or *property*, to raise money for public purposes. Cooley, Const. Lim. 587.

The state may, of course, levy a tax upon property without thereby sanctioning a previous illegal transaction, out of which such property may have been obtained; but the state will not and cannot, consistently with justice, expressly permit the doing of a thing, while at the same time declaring the transaction illegal, and, furthermore, with knowledge of all the facts, place a tax, as an instrument of its own support, upon the proceeds of such transaction. We repeat, the placing of a tax upon property recognizes the legal character of that property and a property right attaching to it.

This property right, however, inheres in the plaintiff.

We have no hesitancy in saying that the legislature never intended consequences, involved in the theory of the defense, so utterly at war with all principles of justice; that

it did not intend to legalize the acts of a mere agent resulting in a contract made in good faith, and then condemn such contract, and order the doors of our courts closed to the party who seeks to enforce it. The denial of all remedy for the enforcement of an obligation or a right is unknown to our law.

We cannot quote apter language applicable to the foregoing discussion than that employed by the court in the case of *Kellogg v. Larkin*, 3 Pinney, 123 (Wis.):

"Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, * * * to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical."

And Judge Caldwell said in a more recent case:

"No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people." *Swann v. Swann* (U. S. C. E. D. Ark.) 12 Fed. 299.

The defendant says that an unauthorized insurance company cannot, under the guise of making insurance along the surplus insurance line, transact a general insurance business in the state. So say we. But as to whether the plaintiff transacted a general insurance business, going outside the surplus insurance business, is by no means apparent from the evidence in this case, and the verdict of the jury, as upon a question of fact, is conclusive upon this point.

We, moreover, call attention to the language of the act which contemplates policies not only as *procured* but also *issued* by an agent in the state. This shows that it sanctions the making in this state of a contract of insurance along the surplus line as valid. Issuing means executing an instrument, as well as delivering it, as counsel for the plaintiff aptly remarks, referring to the case of *Pease v. Ritchie*, 132 Illinois, 638-645.

Issued as used in reference to the issuance of a life insurance policy means that when the policy is made and delivered in pursuance with the laws of the state legalizing such policies, and is in full effect and operation, *it is to be regarded as issued*. *Spencer v. Myers*, 26 N. Y. S. 371,¹ 73 Hun, 274.

Hence when the act of 1903 speaks of policies procured or issued by the agent, it is, in view of the entire act, and a proper construction of it, equivalent to saying that such policies were made and delivered in pursuance with the laws of the state legalizing such policies, i. e. sanctioning such policies to be issued within the state, and that such policies are in full effect and operation within its entire jurisdiction.

We might well stop here by saying that the act of 1903 not merely permits an agent to act, but sanctions the completion of a transaction, in other words, a contract, towards the consummation of which the acts of the agent are directed; that it not only permits a surplus policy to be procured from an unauthorized company, i. e. one not permitted to do a general insurance business, but also to be *issued*, that is, *executed* in this state; and that, therefore, the contract is a legal contract, and all claims arising out of it, are enforceable in this state not only by one but by all parties to it.

Much time has been spent by counsel in this case in discussing the possible consequences which would be involved in the conclusion that the contracts under which the plaintiff claims were illegal and invalid in this state, notwithstanding the act of 1903. Counsel have cited a vast array of authorities for and against the proposition which holds that an agent cannot, after an alleged illegal contract has been fully executed, or an unlawful transaction been completed, refuse to account for and pay over money—the proceeds of such transaction—received by him for his principal.

Some of the authorities holding that the principal may recover money or property received by the agent on account of his principal, or money or property received by one standing in a fiduciary relation, though such money or property

¹ Affirmed 150 N. 269, 44 N. E. 974.—Ed.

may have been the proceeds of an illegal transaction, may be noticed in the following review:

"An agent who has received money from, or in behalf of his principal, cannot defeat an action brought by the principal to recover it, upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose for which it was to be devoted, was illegal." Mechem on Agency, sec. 526, and authorities cited.

If money had been actually paid to an agent, for the use of his principal, the legality of the transaction, of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands. For though the law would not have assisted the principal by enforcing the recovery of it from the party by whom it was paid, because it is the policy of the law not to aid the completion of an illegal contract for another's use, this can confer no right upon the agent to retain it.

This doctrine was recognized by the court of common pleas in a case where a broker having effected an insurance upon a ship engaged in a trade to the East Indies, contrary to the 7 Geo. I, st. 1, c. 21. s. 2, and having received the loss from the underwriters refused to pay it over to his employer, alleging the illegality of the transaction as a defense to the action for money had and received to his use. The plaintiff, however, had a verdict; and the court, upon a motion for a new trial, thought the verdict right. And in a subsequent case, when the defendants had received money for the plaintiff, as the price of counterfeit coin, which they had been employed to carry and procure payment for, from the parties who purchased it, it was held that the illegality of the transaction furnished no defense to them in an action for money had and received.

And, in both these cases, the court considered the original transaction as forming no part of that implied contract arising from the receipt of the money which formed the ground of the action. Dunlap's Paley on Agency, pp. 61, 62.

In the case of *Brooks v. Martin*, 2 Wall. 70, the supreme court of the United States held, that after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, the results of the contemplated operation completed, a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract; especially where the facts appearing are such as to charge such partner with a fiduciary relation, and the law governing such relations applies.

The money and other property for which suit was brought were clearly the proceeds of an illegal transaction. Justice Miller, speaking for the court, said: "We think that, in point of fact, the allegation of the answer—that the traffic in which this firm engaged was the buying up of the soldiers' claims, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrips—is true. We have as little doubt that the traffic was illegal."

"It is," the court further says, "to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive, how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so. * * * The transactions which were illegal have become accomplished facts and cannot be affected by any action of the court in this case."

The court goes on to quote the language of Lord Chancellor Cottenham in deciding a similar case (*Sharp v. Taylor*, 2 Phillips, Chancery, 801) which is as follows: "The

answer to the objection (the illegality of the transaction out of which the present suit arose) appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of, when Taylor (the defendant) received the money; and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other. * * * The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not in any manner be affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts, and asserting title to money which has arisen from them, is distinctly taken in *Tenant v. Elliott*,¹ and *Farmer v. Russell*² (already quoted) and recognized and approved by Sir William Grant in *Thomson v. Thomson*.³

“These cases,” Justice Miller further says, “were all reviewed in the opinion of this court in the case of *McBlair v. Gibbs* (17 Howard, 232) and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound.”

This doctrine was recognized and applied in the following cases: *Planters' Bank v. Union Bank*, 16 Wall. 483, to a case of money received from the sale of “Confederate Bonds;” *Armstrong v. American Bank*, 133 U. S. 433, and *Lehman v. Strassberg*, 2 Woods, 563, Fed. Cas. No. 8216 both holding a person who loans money to another to pay losses sustained in illegal transaction may recover same; *Western Union Tel. Co. v. Union Pacific Co.*, 1 McCrary, 563, 3 Fed. 417, holding property acquired under void contract

¹ Bosanquet & Puller, 3.—Ed.

² Id. 29.—Ed.

³ 7 Vesey, 473.—Ed.

must be distributed according to equity; *Wann v. Kelly*, 2 McCrary, 630, 5 Fed. 584, where joint owner was held liable to account to his associates for money paid under an illegal but completed contract, and in *Cook v. Sherman*, 4 McCrary, 26, 20 Fed. 167, where the precise question as presented in the case of *Brooks v. Martin* was presented.

In the case of *Penn Mutual Life Insurance Co. v. Bradley et al.*, 21 N. Y. S. 876,¹ in which the facts were almost identical with the present case, the court, after stating the action was brought to recover for money had and received by the defendants for the plaintiff while they were acting as plaintiff's agent in procuring life insurance and collecting premiums, said: " * * * the appellant contends that the plaintiff was not entitled to recover the premiums for the reason that the company was not authorized to do an insurance business in the state of New York." And the court, deciding the case, said: " * * * the defendants having received the money as plaintiff's agent, they are not at liberty, when called upon for payment, to set up such a defense."

In the case of *Snell, Taylor & Co. v. Pells*, 113 Ill. 150, our own supreme court said: "Whatever may be thought as to the legality of such a contract or subscription, its illegality, if any, rests solely upon the suggestion that the same is merely against public policy, and not upon the ground that there is anything *immoral* or *criminal* in such a contract. In such case, an agent who has received money for his principal cannot by law set up such supposed illegality as a reason why he should not pay over the same to his principal. The law in such a case does not permit the agent to make such a defense. He is estopped by the relation of agency, and the receipt of the money."

We admit that the authorities do not all agree. There seems to be a tendency in some jurisdictions to deny the principal the right to recover in a case based upon a transaction involving criminality or moral turpitude, or in a case where both the agent and the principal have directly partici-

¹ Aff'd 142 N. Y. 660.—Ed.

pated in the unlawful transaction. *Todd v. Rafferty*, 30 N. J. Eq. 254; *Farley v. St. Paul, etc., Ry. Co.*, 4 McCrary, 141, 142, 14 Fed. 115; *Jackson v. McLean*, 36 Fed. 213; *Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553; *Booth v. Hodgson*, 6 T. R. 405; *Kirk v. Morron*, 6 Heisk. (Tenn.) 445; *Lemon v. Grosskopf*, 22 Wis. 447; *Bishop v. American Preservers Co.*, 157 Ill. 284; *Gregory v. Wilson*, 36 N. J. L. 315; *King v. Winants*, 71 N. C. 469; *Columbia Carriage Co. v. Hatch*, 19 Texas Civ. App. 120, 47 S. W. 288; *Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637; *Mexican Banking Co. v. Lichtenstein*, 10 Utah, 343; *Watson v. Murray*, 23 N. J. Eq. 257; *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15; *McMullen v. Hoffman*, 174 U. S. 639.

But it is difficult, as far as the cases are concerned in which the maxim *in pari delicto* is applied, to conceive it more consistent with justice to require an innocent agent receiving for his principal the proceeds of an illegal transaction fully completed and a thing of the past, to disgorge and pay over such proceeds to his principal, than to require a man to do the same thing whose acts are as odious as, or even more so, than the principal's. This distinction can be only accounted for by placing too much stress upon and giving unlimited scope to a mere abstract legal maxim, such as that *in pari delicto potior est conditio defendentis*.

The danger resulting from a too wide application of abstract legal maxims, and the injustice or even absurdities it sometimes leads to, is forcibly pointed out by Justice Christiancy, who was one of the ablest judges that ever sat on the bench of any supreme court. In the case of *Quirk v. Thomas*, 6 Mich. 76, 110, he says: "One qualification of the rule is that the rule itself shall not be made an engine of wrong and injustice in the hands of the wrongdoer. * * * The rule in question is the same which declares that a party 'must come into court with clean hands'—'that no polluted hand shall touch the pure fountain of justice'—that the court will not aid a party seeking the reward of his iniquity. * * *

"Not only is it incompetent to set up such a defense

against an innocent party, but the law will discriminate as to the degrees of guilt, as between the immediate parties; and it is well settled, both at law and equity, that to enable a party to a transaction merely illegal as against public policy, to show his own fraud in his own defense, the plaintiff must not only be *in delicto* but *in pari delicto*. And it is in this class of cases that the rule *in pari delicto* especially applies; and though the plaintiff may, to some extent, have participated in the illegal transaction, yet, if not *equally guilty* with the defendant, (or at least if there be strong mitigating circumstances in his favor) the latter will not be allowed to avail himself of the defense."

In addition to this, we may point out more especially that the maxim *in pari delicto* does not mean that parties cannot recover, who are both guilty, but such as are guilty in *equal degree*.

It may be said, in view of what appears from the evidence in this case, that the defendant, a resident and citizen of Illinois, was in all respects better advised as to the laws of his own state than the plaintiff; having repeatedly assured plaintiff that by writing insurance on property of citizens located in this state, it was not violating any law, he lulled the plaintiff into a state of security; by his endorsement on every policy issued, that it was issued in compliance with the act of 1903, and assuring the plaintiff of that fact, he obtained from the plaintiff in the shape of its policies the means of collecting large amounts of money as premiums paid by the insured to him, the agent of the plaintiff,—that in view of all these facts, his degree of guilt, if any, is greater than the plaintiff's, and he should, on that account, be estopped from pleading the illegality of these entire transactions as a defense in this case.

There is, however, still another view to be taken in the consideration of this question, and this is with special reference to the act of 1903. Admitting, for the sake of argument, that the several contracts of insurance were illegal, as being in contravention of the general insurance law, yet the act cited expressly permits and sanctions the act of the agent

in procuring the several contracts, and hence the agent in so doing is not placed even *in delicto*, much less *in pari delicto*.

In this event the law, as settled by numerous decisions, requires him to account for and pay over the money received by him on account of his principal. Especially in view of the general law of this state, regulating insurance companies, which does not expressly prohibit the bringing of a suit, either in law or equity, on any claim, legal or equitable, whether arising out of contract or tort, in case the statute for the admission of outside or foreign corporations be not complied with.

Is there, in view of what has been said, any reason in the claim, that we must adopt a construction of the act which would allow an agent, and make it perfectly lawful for him, to procure so-called surplus insurance from an unauthorized insurance company; allow him to receive its policies, and, upon delivery of such policies to the insured, collect the premiums; then permit him simply to put the money into his pockets and refuse to pay it over to his principal? And all this on the plea that what he, the agent, had done was perfectly right and sanctioned by the law, while what the insurer and the insured had done was absolutely void, and odious in the eye of the law. We do not think reason and justice would require us to adopt such a construction.

In view of what we hold to be the law and for the reason that all disputed questions of fact have been properly settled by the verdict of the jury, the court must deny the motion for a new trial and orders that judgment be entered on the verdict.

Judgment on verdict.

(Superior Court of Cook County.)

People, ex rel. George Frank, Louis Stein and Robert
C. Davis

VS.

James Pease, Sheriff.

(April 15, 1899.)

1. **HABEAS CORPUS BASED ON UNCONSTITUTIONAL STATUTE—JURISDICTION OF CIRCUIT COURTS.** The circuit courts have jurisdiction to determine the constitutionality of acts of the legislature in a habeas corpus proceeding.
2. **HABEAS CORPUS—EFFECT OF DECISIONS OF THE SUPREME COURT AS TO THE JURISDICTION OF CIRCUIT COURTS.** Upon a review of the decisions of the Supreme Court to the effect that constitutional questions are to be eliminated in habeas corpus proceedings *held* that they lay down a rule of practice for cases of applications for the writ of habeas corpus in the Supreme Court and not for cases in the circuit courts. *People v. Jonas*, 173 Ill. 316, *considered and distinguished*.
3. **CONSTITUTIONAL LAW. ACT OF APRIL 9, 1875, PROHIBITING SALES OF RAILROAD TICKETS BY UNAUTHORIZED PERSONS IS UNCONSTITUTIONAL.** The act of April 9, 1875, prohibiting sales of railroad tickets by unauthorized persons is unconstitutional and void, because it amounts to a deprivation of property without due process of law and is an unwarranted interference with trade and personal liberty and freedom of occupation. *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 51 N. E. 1006, *approved and followed*.
4. **HABEAS CORPUS TO SECURE DISCHARGE OF RELATORS INDICTED UNDER AN UNCONSTITUTIONAL STATUTE.** The relators were indicted for violation of the Act of April 9, 1875, entitled "An act to prevent frauds upon travelers and owner or owners of any railroad, steamboat, or other conveyance of passengers." Upon habeas corpus proceedings to obtain the discharge of the relators, the act *held* unconstitutional and the relators discharged.

Habeas corpus on relation of George Frank, Louis Stein and Robert C. Davis. Superior Court of Cook County. Heard before Judge Theodore Brentano, April 15, 1899. The facts are stated in the opinion.

R. Prendergast and *John R. McFee*, attorneys for relators.

Charles S. Deneen, state's attorney, *Willard McEwen*, and *Wm. S. Forrest*, attorneys for defendant.

BRENTANO, J.:—

The relators were indicted at the April term, 1898, of the criminal court of Cook county, for violation of an act of the legislature enacted in 1875. The act purports to be for the prevention of frauds upon travelers and owners of railroads, steamboats or other conveyances for the transportation of passengers.

The first section of the act makes it the duty of the owner of any railroad or steamboat for the transportation of passengers to provide each agent who may be authorized to sell tickets or other certificates entitling the holder to travel upon any railroad or steamboat with a certificate setting forth the authority of such agent to make such sales. Section two of this act makes it unlawful for any person not possessed of such authority so evidenced from a railroad company, to sell, barter, or transfer for any consideration whatever, the whole or any part of any ticket or tickets, passes or other evidence of the holder's title to travel on any railroad or steamboat. Section 3 provides that any person violating the provisions of section 22 shall be liable to be punished by a fine not exceeding five hundred dollars (\$500) and by imprisonment not exceeding one (1) year, or either, or both, in the discretion of the court.

The relators sued out these writs of *habeas corpus* alleging the unconstitutionality of the act, especially in so far as the validity of said section two is concerned, it being maintained that the act is in conflict with the constitution of the United States and of the state of Illinois in that it deprives the relators of property, and is an unwarranted interference with trade and personal liberty and freedom of occupation without due process of law, and in that it makes penal or criminal, an act harmless in itself and not hurtful to the community.

Counsel for relators and the special counsel appearing for the state have exhaustively and elaborately argued their respective sides of the propositions involved, and are entitled to great credit for the careful study and analysis of the questions submitted. In addition to the consideration I have

given to the oral and written arguments of counsel, I have considered the opinions of Judges Gibbons and Dunne of the circuit court, rendered in cases similar to the one at bar.¹ These judges hold the statute unconstitutional, and I am not disposed to disagree with them.

Counsel for the state in discussing the question as to whether the statute is a valid and legitimate exercise of the police power says on page 27 of his brief: "*Burdick v. People*, 149 Ill. 600, is authority that settles every question at issue in this case except the contention on behalf of the defendants which arises out of the claim that the statute is a regulation of interstate commerce. *The Burdick Case* is controlling authority until it is reversed or annulled," and asks "Will your honor expunge the opinion of the supreme court on grounds expressly held by the supreme court to be insufficient?"

This court does not feel bound to accept the decision of that case as reported as final upon the questions here involved, and in doing so I feel justified by reason of the novel and significant announcement made by the supreme court in the case of *In re Burdick v. People*, 162 Ill. 48, that "the judgments of affirmance in the *Burdick Cases* and the opinions of the court in deciding them are conclusive only as between the parties to those cases, viz: the people of the state of Illinois and Burdick." In view of this statement that case is enveloped with an atmosphere of doubt which detracts from its value as an authority, and I therefore do not feel bound by that decision, and am not precluded from passing upon the questions involved, unless I am without jurisdiction to do so.

The decision of the supreme court in case of *People v. Jones*, 173 Ill. 316, is cited by the special counsel for the state as presenting an insuperable barrier to the power of this court to discharge the relators on writ of *habeas corpus* even though the court should be of the opinion that the act under consideration is unconstitutional. It is claimed that the

¹ Reported in this volume.—Ed.

decision in that case has determined that constitutional questions will not be decided on *habeas corpus*. I have considered that decision and have weighed carefully the elaborate discussion of counsel concerning the same. In that case the relator, after conviction of the offense with which he had been charged, filed an original petition for a writ of *habeas corpus* in the supreme court. He had been convicted and was being held by virtue of a certain *mittimus* for his arrest and commitment issued by a competent court, and the avowed purpose of the petition in that case was to test the constitutionality of the act under which he had been convicted.

"The question presented to the supreme court was, whether or not, under the statute of this state regulating the subject of *habeas corpus*, the petitioner, who had been regularly imprisoned by virtue of a *mittimus*, after judgment, could, in the mode there pursued, test the constitutionality of the act under which the conviction was had. In deciding the question adversely to the petitioner, the court held that the proper remedy of the petitioner was an appeal from the judgment under which he was imprisoned. In that case the court concedes to the justice of the peace full power and jurisdiction to decide all questions in the case, including the question whether the law under which the prosecution was instituted was constitutional. Therefore, if the petitioner in that case had argued the question of the constitutionality of the ordinance involved in that case before the justice, the latter would have had the power to discharge the defendant had he come to the conclusion that the ordinance contravened the fundamental law of the state.

It seems to me manifest that the distinguishing feature of that case, and which moved the court to hold that the mode there pursued of bringing the case to the supreme court for review was erroneous and came too late, was to be found in the fact that a conviction had properly been had after a trial in which the question of constitutionality had not been raised. Unquestionably the *ordinary remedy* available after conviction is *by appeal* or writ of error. If there (after having been charged with the violation of an ordinance) the prisoner

was found to have been in fault for not having raised the question of constitutionality, how can it reasonably be contended in the case at bar that the relators are precluded from raising this question while they merely stand charged with the offense and before conviction?

If the effect of the Jonas decision is that constitutional questions are to be eliminated in *habeas corpus* proceedings, then it would follow that the writ itself would be suspended in cases wherein it was most urgently needed. A citizen deprived of his liberty under a law in contravention of the federal constitution or the constitution of this state, and in defiance of the provisions of either of these constitutions, is outraged to the same extent as if he were held under no color of authority whatsoever. It can not be assumed, in the absence of an expressed and unequivocal ruling, that the supreme court of Illinois intended to suspend the writ of *habeas corpus* in all cases where commitments were held under void statutes. To hold this would in effect be in defiance of the federal and state constitutions, and an attempt of the courts to suspend *habeas corpus*.

In the following cases our supreme court determined the validity of statutes on *habeas corpus* cases brought originally in that court: *People v. Turner*, 55 Ill. 280; *People v. Illinois State Reformatory*, 148 Ill. 413. Moreover, the United States supreme court has determined this question differently from the *Jonas Case*, and such is the overwhelming weight of authority. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Smith*, 36 S. W. 628, 135 Mo. 223.

The proper view of the Jonas decision seems to me to be that the supreme court of Illinois intended by that decision to lay down a rule of practice for cases of applications for the writ of *habeas corpus* in that court. The jurisdiction of the supreme court of Illinois, and of the circuit court and of the superior court of this county, is concurrent in *habeas corpus*. It is moreover true that the supreme court of Illinois has the right to decline to assume jurisdiction in *habeas corpus*, whereas a judge of a *nisi prius* court must issue the

writ under severe penalties. The supreme court did not intend by the *Jonas* decision to fix any practice applicable to the circuit courts or to the superior court of this county, for the good reason that that subject was not before the court. That statutes relating to *habeas corpus* and to *mandamus*, though in terms applicable to both the supreme court and the circuit courts, may only be enforced in one court, is shown by repeated decisions of our supreme court in which it declines to be controlled by the *mandamus* statute as in the *Jonas Case* it declined to grant the application for the writ of *habeas corpus*. *People ex rel. Cunningham v. Thistlewood*, 103 Ill. 139; *Hawkins v. Harding*, 35 Ill. App. 25.

The writ of *habeas corpus* is the last resort of the citizen oppressed by wrongful imprisonment, wholly regardless of the person or power by whose act the imprisonment is brought about and wholly regardless of the pretense under which such illegal imprisonment is had. From time immemorial the right of a court, such as this to inquire into unlawful imprisonment, has been boundless as the instances of such imprisonment. The law has never recognized a limit as to the cases in which this court will or will not inquire into illegal restraint or imprisonment. So great is the dignity of this writ that each court and each judge exercising authority under it is responsible only to his own conscience and to his own judgment of what the law is. The law commands the court and the judge to exercise this power to the end that no man may be illegally imprisoned. The supreme court of this state in the case of *The People v. Bradley*, 60 Ill. 390, 401, says: "The circuit courts of this state possess an original common law jurisdiction in criminal cases answering to that of the king's bench. Consequently, if our *habeas corpus* act had never been passed, jurisdiction of the writ would have devolved upon the circuit courts by the common law." It has been held in the case of *People v. Bradley*, that the circuit courts possess original common-law jurisdiction in *habeas corpus*, independently of the *habeas corpus* statute. In the *Bradley Case* the supreme court, quoting from ancient books on the law say, at page 398:

"The *habeas corpus ad subjiciendum* (so termed from the language of the writ, to undergo and receive all such things as the court shall consider of the party in that behalf) is that which issues in criminal cases, and is deemed a prerogative writ which the king may issue to any place, he having a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also, in regard to the subject, deemed a writ of right, that is, such an one as he is entitled to *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption and cause of detention to be returned." 1 Chit. Crim. Law, 120; 2 Tomlin's Law Dict., 63, 64. To the same effect is 4 Bacon's Abridgment, 564.

In the case of *The People v. Turner*, 15 Ill. 280, the supreme court of this state delivered an opinion which is one of the land marks of the law, and in which that court held, not only that it had authority in *habeas corpus* causes to pass on the validity of statutes, but held two statutes therein mentioned to be unconstitutional and void.

I am constrained to administer the law in these cases according to the wise principles announced by the supreme court in the case of *People v. Turner*. In that case the supreme court says (pp. 287-8): "It is a grave responsibility to pronounce upon the acts of the legislative department. It is, however, the solemn duty of the courts to adjudge the law, and guard, when assailed, the liberty of the citizen. The constitution is the highest law; it commands and protects all. Its declaration of rights is an express limitation of legislative power, and as the laws under which the detention is had, are in conflict with its provisions, we must so declare."

As late as 1894 the supreme court, in the case of *People v. Illinois State Reformatory*, 148 Ill. 413, on *habeas corpus*, passed upon the validity and constitutionality of a state statute. So it is manifest that from the foundation of the state down to the decision of the *Jonas Case*, it was the law of this state that the supreme court, as well as the circuit

courts, might pass on the validity of statutes in *habeas corpus* proceedings. It will be noticed in the case of *The People v. Jonas*, 173 Ill. 316, that one of the reasons for the rendition of such an opinion is found in the closing sentences of the opinion, where the court says: "The effect of granting writs in cases of this kind would be to allow defendants in all convictions under ordinances or statutes, the validity of which might be questioned, to come directly to this court by a proceeding in *habeas corpus* instead of appealing or prosecuting writs of error as the law contemplates." I therefore am of opinion that the *Jonas Case* in no manner affects the power of this court to determine the constitutionality of the acts of the legislature in a *habeas corpus* proceeding.

I have then to consider how the question stands on principle and authority. The law now under consideration is familiarly known as the "anti-scalping" law, and its object is to prevent by penalty of fine or imprisonment or both, any person not an authorized agent of a common carrier from selling, bartering or transferring for any consideration whatever, the whole or any part of any ticket or other evidence of transportation.

The court of appeals of New York in a recent case, *People v. Warden of City Prison, etc.*, 51 N. E. 1006, 157 N. Y. 116, was called upon to decide the constitutionality of an act similar to the act under which relators are held. Under the New York law as under this law, the buying and selling of passage tickets is not abolished. It is only condemned where the seller has not authority from some one of the transportation companies to act as its agent. What the New York court say is applicable here. "But this act simply turns over to the transportation companies the selection of those who are hereafter to be permitted to sell tickets. It imposes no restraints whatever upon the appointing power, nor upon the agents selected, other than that, in the purchase of tickets, he must confine himself to the properly authorized agents of the transportation companies. The business of buying and selling tickets, as to such agents, continues to be a legitimate

business, but to all citizens other than those who may be selected by the transportation companies the right to buy and sell tickets is denied, and an actual sale by them constitutes a felony."

Here, as there, "It is asserted by counsel that the traveling public and the transportation companies have been so defrauded by the acts of the brokers in the selling of unused or alleged to be unused passage tickets as to call for legislation of a protective character, of which this statute is the outcome. * * * It is novel legislation, indeed, that attempts to take away from all the people the right to conduct a given business, because there are wrong-doers in it, from whose conduct the people suffer. But where in the statute is to be found the evidence that its purpose is to prevent fraud? "In the title of the act" answers counsel, and with that answer he has to be content; for while the act is entitled "Frauds in the sale of passage tickets" the body of the statute does not contain any reference to forged, altered, used or stolen tickets. The sale of such tickets is made a punishable offense under other sections of the Penal Code. The provisions of the act, therefore, have reference to the selling of valid tickets, regularly issued by a transportation company. Can the legislature declare such sales to be fraudulent or prohibit them on the ground that it tends to prevent fraud? If the act prohibited is fraudulent, there can be no doubt that the legislature, under its police power, may provide for its punishment; but whether it may, under such power, interdict the sale of a valid ticket by one person to another, upon the pretext that fraud will thus be prevented, presents a very different question. I confess that I am unable to see how such a sale defrauds a transportation company. If a transportation company sells a ticket from New York to San Francisco, it undertakes to carry the holder from one place to the other. It costs the company no more to carry one person than it does the other. How then can it be defrauded or in any way prejudiced by the transfer of such ticket by the purchaser to another person.

"It is said that the prohibition of such a sale tends to pro-

tect the traveler from being defrauded. If it is a sale of a valid ticket no fraud can possibly result, and if it is not a sale of a valid ticket, then the sale is fraudulent and is prohibited by other provisions of the Penal Code."

What the Court of Appeals further say is also applicable to this case, to wit: "It is not contended that the business of ticket brokerage is in itself of a fraudulent character. The business can be honestly conducted; it has been so conducted in the past by honest men engaged in it, and the most that is asserted is that there are some men engaged in the business who have imposed on the public. The same assertion can be made with equal truth of every business, trade and profession. * * * Whatever the legislature's motive, the fact that it has passed an act which does not declare ticket brokerage unlawful, for it allows any person who may be fortunate enough to secure an appointment as agent for a transportation company to engage in ticket brokerage but the act does declare that if any person, other than an agent of a transportation company, undertakes to engage in the passenger ticket brokerage business, he shall be guilty of a felony; in other words that it is unlawful for all citizens of New York to engage in the buying and selling of passage tickets unless empowered to do so by the written appointment of a transportation company."

The court then asks itself the question whether the organic law prohibits legislation of this character. It admits that it is within the power of the legislature to regulate the manner in which certain kinds of business may be conducted; but denies the power of the legislature to deprive every citizen, engaged in the ticket brokerage business, of the "liberty" to further conduct such business, because forsooth, there have been some dishonest persons engaged in it with the result that frauds have been perpetrated on both travelers and transportation companies, and "to cut up root and branch, a business that may be honestly conducted to the convenience of the public and the profit of the persons engaged in it is beyond legislative power. If the law were otherwise, no trade, business or profession could escape de-

struction at the hands of the legislature if a situation should arise that would stimulate it to exercise its power, for in every field of endeavor can be found men that seek profit by fraudulent processes." The court thereupon pronounces the statute to be in contravention of the constitution and void, and discharged the relator who had brought *habeas corpus* proceedings to test the constitutionality of the law under which he was being deprived of his liberty.

I can not escape the sound reasoning and convincing logic of that decision, and feel bound to follow it as a guide and an authority.

The order therefore is that the relators be discharged.

(Circuit Court of Cook County. In Chancery.)

Samuel Stevenson

vs.

John Alexander Dowie.

(January 31, 1902.)

1. **FRAUD—MUST BE CLEARLY SHOWN—SUSPICIOUS CIRCUMSTANCES.**
A charge of actual fraud must be clearly proven and suspicious circumstances alone are not sufficient.
2. **UNDUE INFLUENCE—HOW DETERMINED.** The existence of undue influence cannot be determined by the assertion or denial of the parties on the witness stand. It involves the question of the relative condition of the minds of the respective parties at the time of the transaction complained of and upon this subject the evidence takes a wide range.
3. **EQUITY—RELIEF AGAINST IMPROVIDENT CONTRACT.** Equity will not grant relief against a contract however absurd or improvident it may be if entered into and executed by the party asking the relief, in the free and uncontrolled possession of his mind.
4. **EVIDENCE—VALUE OF LETTERS AS.** Letters are always valuable aids in arriving at truth; they may be said to be milestones upon the road to truth and are free from all influences that actuate the living witness.
5. **UNDUE INFLUENCE—WHEN RELIEF IN EQUITY GRANTED ON ACCOUNT OF.** The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality.

It reaches every case, and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed.

6. **CONFIDENTIAL RELATIONS—RELIEF IN EQUITY ON ACCOUNT OF—ABUSE OF.** Where two persons stand in such relation that confidence is necessarily reposed in one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, equity will relieve, although the transaction could not have been impeached in the absence of such confidential relations.
7. **SAME—BURDEN OF PROOF TO SHOW ABSENCE OF UNDUE INFLUENCE.** The "heavy" burden of proof is upon the person occupying the confidential position to show that the influence has not been improperly exerted or the confidence abused.
8. **JOINT ENTERPRISES—LIABILITY OF MEMBERS OF TO CREDITORS AND SUBSCRIBERS—EFFECT OF SECRET AGREEMENT.** Where two persons engaged in a joint enterprise enter into an agreement with third persons in relation to the organization of a corporation, the two members of said enterprise are liable to creditors of said corporation and to subscribers for its stock, even though under a secret agreement one of the members of such joint enterprise is relieved from all responsibilities.
9. **UNDUE INFLUENCE—EXECUTION OF CONTRACT—RELIEF AGAINST WHERE IMPROVIDENT.** Where undue influence in procuring the execution of a contract between parties in confidential relations is charged, the court looks first to see whether the contract is reasonable and beneficial, and whether there was a reasonable consideration for the making of it. While the fact that the contract is unwise, foolish and improvident will not of itself justify a court in relieving the party from the effect of such contract, yet if the court can see that there is want of consideration, or a very inadequate one, such fact should be taken into consideration with other inequitable incidents in determining whether the party was induced to enter into the contract by undue influence.
10. **CORPORATIONS—LIABILITY OF MEMBERS OF BY DOING BUSINESS UNDER NAME OF EXISTING CORPORATION.** Where persons do business as an incorporated association but under a name similar to that of an existing corporation, which they have procured to be organized and thereafter abandoned, the members are personally liable to creditors who deal with such association under the belief that they are dealing with the corporation.
11. **RULE AGAINST PERPETUITIES—PIOUS TRUSTS.** Parties will not be allowed to speculate in real estate and manufacturing plants under the guise of "pious trusts" and thus avoid the rule against perpetuities.

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12. **CONTRACTS—BETWEEN CLERGYMAN AND PARISHIONER—WHEN SET ASIDE—PUBLIC POLICY AND UTILITY.** Where a clergyman obtains spiritual ascendancy over a person under a state of religious delusion and obtains conveyances or contracts while under such delusion the court will set the same aside on the ground of public policy. The same principles are applicable to such a relation as to that of guardian and ward.
 13. **CLERGYMAN AND PARISHIONER—UNDUE INFLUENCE—KNOWLEDGE OF EFFECT OF INSTRUMENT EXECUTED.** Where conveyances are made to a clergyman by one over whom such clergyman has spiritual ascendancy the court will not set the same aside if they are purely voluntary well understood acts of the mind, but if they are not of that character the court will inquire into the motive and the intention under which the act was done. The conveyances must not only be voluntary but with knowledge of their effect, nature and consequences and the grantee is bound to communicate such facts to the grantor.
 14. **SAME—PUBLIC POLICY.** Transactions between a clergyman and his parishioner where the influence of the relation prevailed are held to be void upon the principle that the interest of the general public demand such holding.
 15. **CORPORATION—CARRYING ON BUSINESS UNDER GUISE OF—PUBLIC POLICY.** Where a corporation is legally organized for the purpose of carrying on a particular business and officers are elected and the charter recorded, but the business is thereafter carried on under agreement as an unincorporated association so that the public are likely to be misled, such an agreement is against public policy.
 16. **LACHES—WHETHER TIME SPENT IN EFFORTS TO COMPROMISE WILL EXCUSE DELAY.** Equity requires diligence in parties demanding relief from fraud but where time is spent in endeavoring to settle a controversy and thus delay is occasioned, this will take the case out of the rule of laches. The law books with favor upon efforts to settle controversies.
 17. **RATIFICATION OF CONTRACT—INTENT AND KNOWLEDGE ESSENTIAL.** A ratification can only arise from an act of the mind, and the intent of the party to ratify, knowing all the facts and circumstances connected with the transaction.
 18. **RATIFICATION OF VOID AGREEMENT.** Where an agreement is void as against public policy it is doubtful whether the same can be ratified.
 19. **CONTRACTS—RELIEF WITH RESPECT TO—WHERE PARTY SOUGHT INDEPENDENT ADVICE.** The fact that a party sought independent advice before entering into an agreement is not a bar to obtaining relief with respect to the agreement. It is but a circumstance to be taken into consideration.

20. **UNDUE INFLUENCE—PERSON UNDER CANNOT REPUDIATE TRANSACTION AS TO THIRD PERSON.** A person cannot on his own right repudiate a transaction as to a third person by reason of undue influence exercised as to him.
21. **EXECUTORS—RIGHTS OF, TO RELIEF IN INDIVIDUAL CAPACITY WHERE RIGHTS APPERTAIN TO REPRESENTATIVE CHARACTER.** A party cannot have relief as an individual complainant where his rights are those which appertain to him in his representative character as executor.
22. **CORPORATIONS—STOCK HELD BY ONE PERSON WHETHER NECESSARY PARTY.** The fact that all of the stock of a corporation is held by one person does not excuse the joining of such corporation as a party defendant.
23. **CORPORATIONS—REPRESENTATION BY OFFICERS AND STOCKHOLDERS IN LEGAL PROCEEDINGS.** A corporation is not represented in legal proceedings by its officers and stockholders.
24. **PARTIES—HAVING INTEREST IN SUBJECT MATTER—DUTY OF COURT.** It is the duty of a court of equity to require that all persons not parties to the suit who appear to have any interest in the subject matter in litigation, be brought into court before final decree.
25. **EQUITY—MISPLEADING IN, AND WANT OF FORM.** It is a maxim in equity that no person shall be injured in its court by mispleading or want of form.

Bill to cancel certain contracts, dissolve partnership and for the appointment of a receiver. Gen. No. 222,960. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

E. L. Reeves, for complainant.

Samuel W. Packard, for defendant.

TULEY, J.:—

The complainant in this case, Samuel Stevenson, in the year 1899, and for about twenty years previous thereto, had been engaged in the manufacture of lace goods at Beeston, Nottingham, England. He had considerable reputation as an expert manufacturer, and was engaged in a profitable business. Although he was one of the leading manufacturers of lace, his education was a limited one, being derived, as he stated, in early life at the knee of his mother by reading the family bible. He was reputed a zealous

Christian, held gospel meetings in his own house, which were attended by his numerous employees and others. He aspired to be a missionary preacher and was in the habit of delivering sermons to congregations. His credit appears to have been good in his business relations, and he was noted for his kind treatment in dealing with his employees.

In 1894 he received a copy of "Leaves of Healing." He wrote the defendant Dowie to No. 6020 Edgerton avenue, Chicago, enclosing a contribution of two pounds, asking for additional copies of the "Leaves of Healing," Dowie's photograph and twelve copies of the "Leaves of Healing" for each week to the end of the year. To this letter Dowie replied the next day after receiving the same. The correspondence continued between them, and in 1899 Dowie wrote to the complainant a letter of date December 20th, 1899, in which, after considerable talk about the Christian Catholic Church, of which Dowie was General Overseer, he says: "Now, this brings me to the place where I feel as your General Overseer that it is my duty to address to you a call for service. It is this—come as soon as ever you can to America, and be my guest in Zion Home, and see the site of Zion City, and investigate for yourself the condition of your special manufacture and the prospects of success for it in America."

It appears that prior to December, 1899, Stevenson made application by letter to Dowie, and had been received as a member of the Christian Catholic Church. In January, 1900, the complainant Stevenson came, bringing with him his only child, aged fourteen, to America, was received and treated with marked distinction by the officers of the church, and was invited to, and became, for a considerable part of the time during which he was in America, a guest at the defendant's home. He was treated with great kindness and consideration by the defendant and his family, was prominently put forward in the church meetings by Dowie with great praise and commendation, in connection with Dowie's declared intention to establish the coming City of Zion, and to build therein a large lace manufactory. Stevenson, at Dowie's suggestion, visited the Eastern United States, for the pur-

pose of acquainting himself with the condition of the lace industry of the country and the prospects of success of the proposed establishment at Zion City. He was made a deacon in the church when upon this visit.

The question of the purchase by Dowie of all, or nearly all, of the plant of Stevenson, in Beeston, England, and its removal to this country, and setting the same up in Zion under the management of the complainant Stevenson, arose, and, ultimately, the price was agreed upon. The price fixed was \$50,000 in money and a further consideration of \$100,000 full paid stock to be given to Stevenson in a corporation to be formed by Dowie under the laws of the state of Illinois, with a capital of one million dollars. A written agreement was entered into between Dowie and Stevenson the 12th day of April, 1900, which provided that \$50,000 was to be paid Stevenson as follows, to wit: \$35,000 cash, and the balance of \$15,000 in payments of \$5,000 each, in the following June, July and August. In addition to selling the lace factory to Dowie, Stevenson covenanted and agreed to proceed to England and take the necessary steps for the transplanting of the factory to the site of Zion City. Stevenson also covenanted that any charge or liens that might exist against the plant, he would discharge, but any part of the plant which it was deemed impractical to remove, might be sold by Stevenson, and the money to belong to him, Stevenson. The removal was to be at the cost of Dowie. Dowie agreed also to incorporate, or cause to be incorporated, a stock company, to be called the "Zion City Lace Industries," with stock of one million dollars, divided into shares of \$100 each, and to transfer, or cause to be transferred, a tract of land in Zion City suitable for the location of said industry, containing not less than twenty-five acres of land, and all of the machinery and patents purchased by him from Stevenson, and the consideration of such conveyance by Dowie to the corporation was to be treated as payment in full of \$620,000 capital stock of the corporation, out of which he was to give Stevenson \$100,000, paid up stock, and the balance of the stock, \$380,000, was to be treated as treasury

stock, to be used for the purchase of machinery, tools, and building appliances, Dowie guaranteeing to purchase, or cause to be purchased, at par so much thereof as might be necessary for that purpose. Of Dowie's \$520,000 of stock remaining, he was to have issued to himself stock amounting to \$501,000, and \$19,000 of the stock was to be issued and transferred to certain parties, most of whom *were employees* or lace experts who Stevenson was to induce to come to America, to work in these new industries.

Leaving his son at Dowie's home, upon the next day after entering into this agreement, Stevenson returned to England for the purpose of dismantling his factory, disposing of his property and arranging to ship the machines, etc., to America, and bring out with him the expert lace makers to be employed in the industry. He did have the machinery boxed, crated, and shipped to America, made arrangements with various employees to come to America to work in the factory, and placed orders for new machinery for the enterprise with various manufacturers of machinery in England and Scotland.

Although Dowie did furnish Stevenson after his return to England about \$20,000, some trouble and inconvenience apparently was caused by the failure of Dowie to promptly respond to the demands of Stevenson in regard to moneys to be paid on account of his expenses and on new machinery ordered. Stevenson took with him the \$35,000 cash paid him by Dowie, and upon his return to England, discharged an indebtedness which was held in the nature of a lien upon his plant by one Woodward, to the amount of \$30,000.

During the three or three and a half months that Stevenson had been in America, a large part of the time in the private family of defendant Dowie, he fell in love with, and became engaged to be married to, "Methie" Dowie, called by Dowie "his sister," but who was, in fact, his wife's sister and Dowie's own cousin. The marriage was to take place upon the return of Stevenson after his visit to England. Stevenson returned from England to America and arrived in Chicago about the 10th of July, 1900, and went immediately to

the home of the defendant. On the 24th day of July Stevenson was married to Methie Dowie, by the defendant in the Zion Tabernacle, before a large audience. The complainant Stevenson, on the day of his marriage, executed a note of \$50,000, payable to Dowie as trustee for Methie, Stevenson's future wife, on demand, reciting that Dowie was to hold as security for the payment of the note all of Stevenson's interest in the Zion Lace Industries.

While Stevenson was in England, Dowie, in pursuance of the agreement of the 12th of April, did cause an incorporation to be formed for the purpose of manufacturing lace, linen, spinning cotton, and weaving wool, and making such special machinery as was necessary in the carrying on of such industries, a corporation to be known as the "Zion Lace Industries." The stock was all subscribed for, Dowie subscribing for all but four \$100 shares. The remaining four shares were subscribed for by members of Dowie's business cabinet. No transfer was ever made to the corporation of the property purchased by Dowie from Stevenson, nor was ever any stock issued by the corporation, although the same had been prepared ready for issue. About the date of said marriage, or very soon thereafter, Dowie proposed to Stevenson, that the corporation project be abandoned and that a new agreement be made for the carrying on of the Zion Lace Industries upon a similar plan to that which had been adopted for carrying on the Bank of Zion, and other projects connected with the building of the coming City of Zion where the industries were to be located. This resulted in a new agreement being dated August 4th, 1900. This agreement referred to in the evidence as the "public agreement" is executed on the 8th of August, 1900; there being, it is contended by defendant, a private agreement between the complainant and defendant, executed at the same time and part of the same transaction.

The public agreement is unusual in its character, extraordinary in its provisions, and probably unlike any agreement between parties ever produced in a court of record. It was entitled "Articles of Agreement, Zion Lace Indus-

tries." It purports to be an agreement between John Alexander Dowie and Samuel Stevenson on the one part, and the preferred shareholders or persons who might become preferred shareholders thereafter, on the other part. It recites, in substance, Dowie's "purchase of a large tract of land in Lake county, a few miles north of Waukegan, in the state of Illinois, upon which he intends to build a city to be known as Zion City, and for the purpose of furnishing employment to some of the residents of said proposed city, he has purchased the lace factory of Samuel Stevenson, located in Beeston, Nottingham County, England, or the greater portion of tangible property thereof," describing the same, "which is to be removed by said John Alexander Dowie to said Zion City site, where said factory and other adjuncts and accessories thereof are to be located upon, and have appropriated to their use, not less than twenty-five acres, constituting part of said Zion City site; and

"WHEREAS, it has been agreed between said John Alexander Dowie and said Samuel Stevenson that the said factory * * * and the said twenty-five acres upon which the same is to be located as before mentioned, together with the personal influence and services of said Dowie in establishing and carrying forward the business contemplated by this agreement, which is to be done under the name of 'Zion Lace Industries,' is to be considered and estimated as of the value of \$670,000 and is to be represented by five thousand shares of stock of the par value of \$100 each, which are to be known as proprietary shares, and seventeen hundred shares of the par value of \$100 each, to be known as common shares, which are to participate in the distribution of the profits derived from said business in the manner hereinafter specified; and

"WHEREAS, the said * * * Dowie is desirous of obtaining more capital to enable him to purchase more machinery and other personal property for said industries, and for the erection of the buildings therefor, and for other necessary expenses connected with the establishment, enlargement, and carrying forward of said industries, which industries are to include the manufacture of lace and linen, the

spinning of cotton, the weaving of wool, and other adjuncts and accessories of such industries.

"Now, THEREFORE, The undersigned hereby subscribe for and agree to pay to said John Alex Dowie the sums set opposite their respective names, for the purpose of furnishing such further capital for said Zion Lace Industries, upon the following terms and conditions:

"1. The fund subscribed for shall be divided into shares of \$100 each, and shall be known as the preferred capital stock of said Zion Lace Industries.

"2. All shares of stock in said Zion Lace Industries shall be represented by certificates, which shall be issued to each shareholder, stating the number and kind of shares held by him, and shall be signed by said John Alex Dowie, or by his attorney in fact, and by the secretary."

Provides for the assignment of shares and the issuing of a new certificate upon such assignment, the assignee becoming a shareholder, and succeeding to all the rights and privileges of the assignor of the certificate.

The interest of the shareholders and subscribers is declared to be personal property, and on the death of any shareholder, to go to his personal representatives.

Provides: "*It is distinctly understood and agreed, that the shareholder herein shall not become copartners together with said John Alex Dowie or said Samuel Stevenson in the business of said Zion Lace Industries, but that the capital contributed by common and preferred shareholders shall be returned to them in any event as herein provided; and that the profits which common and preferred shareholders shall receive in the way of dividends shall be by way of compensation for the use of their capital, and all the assets and property of the Zion Lace Industries, including the capital contributed by the common and preferred shareholders, shall be held, owned, possessed, and controlled by said John Alex Dowie, and in case of his death, by his executor and trustee or successor. No other shareholder shall have any title to, or interest in, legal or equitable, or possession or control of, any assets or property, real or personal, of said Zion Lace*

Industries, nor any right, authority or power to make any sale, transfer or disposition thereof, or to contract any debts or incur any liabilities, or act in any way for said Zion Lace Industries, but the said John Alex Dowie shall alone be responsible for all the debts of said Zion Lace Industries, and all actions and suits by and against said Zion Lace Industries shall be carried on in his name," and gives him full authority "to manage, lease, sell, exchange, mortgage, and convey, from time to time, the real or personal property of said Zion Lace Industries, or any part thereof, as he shall deem best;" the purchaser or mortgagee is not required to see to the application of the money so raised.

Gives Dowie authority to make such rules for the management of the affairs of said Zion Lace Industries as he shall deem best "not inconsistent with the provisions of this agreement."

"The secretary, general manager and all the employees shall be employed, and their salaries fixed by Dowie, and they shall be responsible to and removable by him alone. Said Samuel Stevenson shall be the first general manager of said Zion Lace Industries, under the supervision of said John Alex Dowie. Dowie to receive no salary or compensation for his services. In some conspicuous place in the office of the Zion Lace Industries there is to be posted a notice, in substance, as follows: 'The Zion Lace Industries are not incorporated. John Alex Dowie is the owner of all the property and assets of the Zion Lace Industries, and responsible for all obligations. Shareholders have no power to act for or bind the Zion Lace Industries, in any way, and are not liable for any debts.' Dowie guarantees to pay interest on all shares of stock, common and preferred, at the rate of six per cent. per annum, payable semi-annually, the first dividend being payable January 1st, 1901. Stock to commence to earn dividends from date of issue.

"On the 1st day of July, 1902, and on the 1st day of every July thereafter, there shall be paid on each common and preferred share of stock, then outstanding, 'a further dividend, if earned, out of the net profits of said Zion Lace Indus-

tries,' at the following rates: 'From July 1, 1901, to July 1, 1902, at the rate of seven per cent., adding one per cent. for each year until the year from July 1, 1906, to July 1, 1907, reaching the rate of twelve per cent., and thereafter at the rate of twelve per cent. until the termination of the agreement.' 'But it is distinctly understood and agreed that all dividends above the six per cent., guaranteed as aforesaid, must be derived from the net earnings of the said Zion Lace Industries, as herein provided, or else they are not payable.' If default should be made in the payment of the extra dividend, over and above the six per cent., the secretary shall, soon after the 1st of July, wherein the default occurs, prepare and mail to each shareholder a statement of the condition of the Zion Lace Industries, so that the shareholders may have some idea how long they may have to wait until the defaulted dividend is earned and made up to them; but 'the shareholders shall have no right, without express permission is first obtained from said John Alex Dowie to examine the books of said Zion Lace Industries.'

"5. When the net profits are ascertained, on or about the first day of July of each year, the same shall be used to pay the full amount (or pro rata as far as the same will go) of all the dividends due and unpaid upon all the preferred stock; and after the payment of such dividends then the balance of the profits to be used to pay dividends due and unpaid upon the common stock pro rata. After the payment of all dividends due upon said common and preferred stock at the highest rates herein stipulated for the balance of the net earnings to be applied to the payment of dividends upon the proprietary shares of stock in the Zion Lace Industries owned by John Alex Dowie."

Also contains a provision by which if he receives any such dividends and the future net profits should be insufficient to pay the agreed dividends payable out of the profits, that Dowie will refund such dividends as he receives, to the amount necessary to pay the same.

Also provides that common and preferred shareholders shall have no right to an interest in the profits of said Zion Lace

Industries, or its property or assets, beyond the right to receive the maximum amount of dividends provided for, but all the profits "over and above such dividends, as well as all its property and assets, shall belong to and be the property of said John Alex Dowie, without any liability to account therefor to any party whatsoever. John Alex Dowie is given power, so long as he shall be of the opinion that the capital can be advantageously used, to sell shares of stock, but no shares of preferred stock to be sold for anything but cash and at its par value. Shares of common stock may be issued by said Dowie for property purchased for said industries. Also, that it is expected that the Zion Lace Industries will grow to such proportions as to make it necessary 'in order to enable it to expand so as to successfully handle its increase of business, * * * to have a very much larger quantity of land constituting a part of said Zion City site, and amounting to probably 350 acres altogether, and it is therefore agreed that said John Alex Dowie may from time to time, as he may deem best, appropriate more land to the use of said Zion Lace Industries, and have proprietary shares of stock issued to himself therefor upon such estimate of the value of said land as to him shall seem wise and best.' The shares of stock so issued to stand upon the same basis as the other proprietary shares."

Provides that Dowie shall keep a share register and stock certificate books and all other proper books to record the business of said Zion Lace Industries.

Provides for the method of giving notice to shareholders and that the stock certificate and share register shall be considered sufficient evidence as to the ownership of the shares at any time.

That neither the death of said Dowie nor of Stevenson nor of any shareholder, "or any change in the ownership of the shares or certificates, in said Zion Lace Industries, shall work a termination or dissolution of this joint enterprise;" that neither any assignee of any shareholder or his personal representatives, in case of death, shall be entitled to an account or an inventory, but he may have a new certificate

issued to him upon the surrender of the old one. But if he does not care to have a new certificate and become a stockholder, he may, upon request to the secretary, surrender the certificate owned by the decedent and obtain the promissory note of said Dowie, or his executor, etc., "for the amount of the par value of the shares represented by such certificate payable to the order of the representative of such decedent, and due on or before eighteen months after the date of the death of such decedent, with interest thereon at the highest rate which the holder of such shares would be entitled to dividends thereon for the period covered by said note."

In case of the death of Dowie he is to name an executor and trustee in his will, who "shall succeed to all the assets, property, and liabilities, duties and responsibilities, rights, powers, and privileges of said Zion Lace Industries, and of said John Alex Dowie, under this agreement, so that this joint enterprise may continue until July 1, 1919, unless sooner terminated by the redemption of all the outstanding shares as herein provided."

Then provides for the manner of redeeming the shares upon notice given by Dowie at any time; that such redemption will be made at the office of the Zion Lace Industries, at a certain time not less than one year, such notice to convert the shares into a final money demand, due at the time specified in the notice for redemption for the full amount of the par value of the shares, with interest at a rate, which, added to the dividends, would be within the highest rate of dividends provided for in the agreement, and when such notice is given, the shareholder on the surrender of the certificate shall receive a merchantable promissory note signed by Dowie, or his executor, etc., which would become due on the date fixed for redemption. After the giving of such notice the shareholders have no further interest in the earnings or profits of the industry, and shall not be entitled to any statement of the affairs or conditions thereof; but his rights shall be simply those of a creditor of said Dowie, his executors, etc., for the amount which will become due to him upon his

shares of stock at the time appointed for the redemption thereof.

This "joint enterprise" it is provided "shall continue until July 1, 1919, unless sooner terminated by the paying off of all shareholders." And at that date Dowie is to pay the full par value for every share of stock outstanding "which sum, together with the dividends previously paid, and the dividends due on that date upon such shares, shall be in full payment and satisfaction of all claims, rights, interests, and demands against said Zion Lace Industries, or said John Alex Dowie."

"In order to manifest the assent of said John Alex Dowie and said Samuel Stevenson to all of the terms and provisions of this agreement, made with the preferred shareholders of the said Zion Lace Industries, the said John Alex Dowie and the said Samuel Stevenson have hereunto subscribed their names," signed by Dowie and Stevenson, and below their signatures appears:

SUBSCRIBERS' NAMES, ADDRESSES AND AMOUNTS SUBSCRIBED BY THEM.

Subscribers' Names.	Addressees.	No. Shares.	Total Amount Subscribed in Dollars.
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.....
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At the time of the signing of said public agreement there appears to have been signed at the same time and as a part of the same transaction, a so-called "private agreement." This private agreement bears the same date and is, in substance, as follows: "THAT WHEREAS, By an agreement dated the 12th day of April, A. D. 1900, providing for Dowie's organizing an incorporated stock company for one million dollars, to acquire and carry forward a manufacturing enterprise to be called the Zion Lace Industries, the stock of

which should be divided into shares of \$100 each and of which John Alexander Dowie should have \$520,000 and said Samuel Stevenson \$100,000, full paid stock; and

“WHEREAS, it is now deemed advisable that said arrangement should be changed, and that the business which said contemplated corporation was to acquire and carry on shall be owned, controlled, and carried forward by the said John Alex Dowie in his own right;

“Now, THEREFORE, it is hereby mutually agreed by and between said John Alex Dowie and said Samuel Stevenson,” that instead of giving Stevenson the \$100,000 of the full paid stock of the said corporation, Dowie was to give him 1,000 shares equal to \$100,000 of stock known as common stock in said Zion Lace Industries, to be issued to him in accordance and under the provisions of the agreement dated August 4th, 1900, a copy of which last mentioned agreement “is hereto attached and made a part hereof.”

Provides that Dowie shall be relieved from his agreement to turn over to the contemplated corporation the property and assets bought by him under the agreement of April 12, 1900, and that he should “own, hold, possess, and enjoy, individually and in his own right, free from any trust, all of said assets and property, as well as the rights and privileges which said corporation would have owned, possessed, and enjoyed” under the agreement of April, 1900, if it had been fully carried out, “and in lieu of so turning over to said contemplated corporation the said property, assets, land, rights, and privileges aforesaid, John Alex Dowie is to contribute toward the capital stock of said business to be carried on under the name of the Zion Lace Industries, in pursuance of the public agreement, a copy of which is attached hereto, all the said property, assets, rights, and privileges which he was to give or transfer to said contemplated corporation, and is to receive and have issued to himself and such parties as he may designate therefor, a certificate or certificates for five thousand shares of stock of the par value of \$100 each in the said Zion Lace Industries, which are to be known as proprietary shares, and also two hundred shares

of the par value of \$100 each of the common shares of stock in said Zion Lace Industries, to be issued in accordance with and under the provisions of the agreement made with the preferred shareholders in said Zion Lace Industries."

Then provides that Stevenson sells to Dowie for the said Zion Lace Industries, in addition to what he sold by the agreement of April 12th, 1900, other machinery and property, and that for the additional machinery and property Stevenson is to be paid in cash by Dowie the sum of \$35,000, and the money or cash so paid to Stevenson, together with a sum sufficient to make a total amount of \$50,000, is to be turned over by said Stevenson to said John Alexander Dowie, "as trustee for Mary Ann Stevenson, nee Dowie, the wife of said Samuel Stevenson, in payment for the promissory note of said Samuel Stevenson, to said John Alex Dowie, trustee, given under the ante-nuptial marriage settlement, and that the said \$50,000 so received by said John Alex Dowie as trustee, is to be held, owned, possessed, and enjoyed by him as an individual in his own right, and that he is to issue therefor to said Mary Ann Stevenson, a certificate or certificates of stock for five hundred shares of the par value of \$100 each of the common stock in said Zion Lace Industries, under and in pursuance of the agreement with the preferred shareholders, a copy of which is hereto attached." Signed under the same date, the 4th of August, 1900, by John Alex Dowie and Samuel Stevenson. Below their names is: "I, Mary Ann Stevenson, hereby assent to and approve of the foregoing agreement.

"Witness my hand and seal the day and year last above mentioned.

"Mary Ann Stevenson. (Seal.)

The ante-nuptial marriage settlement, referred to in the last mentioned or so-called private agreement, was contained in a note given by Samuel Stevenson to John Alexander Dowie, as trustee for Methie Stevenson for \$50,000, payable on demand, and pledging as collateral security for the payment thereof, all of his (Stevenson's) interest in the Zion

Lace Industries. This note is dated the 24th of July, the day on which Stevenson married Methie Dowie.

The weight of the evidence tends to show that there were three copies made of the so-called "public agreement" and that two of the three copies had a copy of the "private agreement" attached to the same; that one copy, with the private agreement attached, was delivered on the evening in question, the 8th of August, to Samuel Stevenson, a like copy to John Alexander Dowie, and the third copy, which was intended for the subscription of those who should afterwards become preferred shareholders, was retained by Attorney Packard, who was present at the time;

That the price of the additional machinery, put at \$35,000 in the agreement, was raised from \$30,000 to \$35,000 upon the suggestion of Mr. Dowie or his attorney, thereby making the amount due to Samuel Stevenson upon the two separate sales of parts of his plant, the sum of \$50,000—\$15,000 on the first sale, which had not been paid, and \$35,000 on the second sale.

It also appears that John Alexander Dowie drew checks for said two amounts upon the Zion Bank, payable to the order of Stevenson, and that thereupon Stevenson drew his own checks upon the Zion Bank, for \$50,000, and gave the same to Dowie, in payment of his \$50,000 ante-nuptial note; that his wife, Methie Stevenson, directed Dowie to invest the same in common stock of the Zion City Lace Industries as organized under the public agreement of August 4th.

Dowie, his wife and family and Stevenson and his wife had arranged to leave for Europe upon the next day. Barnard, the financial manager, was present upon the evening that the papers were signed.

Dowie gave to Barnard certain papers, including his power of attorney, and the combination of his (Dowie's) private safe, and laying his hands upon Barnard's shoulders, prayed the Lord that He might keep him faithful to his trust.

At the same time the evidence tends to show that certain papers were delivered by Stevenson to Barnard, or to Dowie, who then and there passed the same over to Barnard, al-

though Stevenson swears that he gave to Dowie his copy of the August 4th contracts to keep for him, and that he gave Barnard only a power of attorney to act for him, and a will of his own and one of his wife, the next morning at the Zion Bank, Chicago.

Stevenson's subsequent conduct in reference to the custody of the papers in question, tends to show that he believed that he gave Dowie the August 4th contracts and also the April 12th agreement on the night in question, and the other papers to Barnard the next day.

Soon after they left the so-called public agreement was published in the *Leaves of Healing*. The private agreement was not published or made public in any way, until after the trouble arose between Dowie and Stevenson, which resulted in the bringing of this suit.

Stevenson and his wife, the defendant and his wife and family went first to the Paris Exposition, where, after remaining for a few days, they went to England, made the trip to Scotland and to Ireland and finally returned to England, the complainant being busily engaged in looking after the shipping of the machinery of his plant, and the employing and sending over of some of the lace makers employed in the lace industries of Zion City. In the trips through England, Scotland and Ireland, Stevenson assisted Dowie in the holding of his meetings, which the evidence tends to show were not attended with a great deal of success, several of them being very turbulent.

November 6th, 1900, Stevenson sailed with his wife and Deaconess Breger and her mother for America. The wife of complainant was sick at the time they sailed, and died on board ship when two or three days out, and was buried at sea.

The complainant arrived at Chicago about November 28th, most of the machinery arriving during the months of October and November of the same year. The defendant remained a short time in England, and on the continent, returning to America in the month of January, 1901.

Difficulties arose between the complainant and the defend-

ant in regard to meeting obligations connected with the ordering of new machinery by the complainant for the Zion Lace Industries, and also in regard to the management of the work that was going on in the establishment of the plant. These difficulties culminated in an open breach about the 9th or 10th of April, 1901, and complainant's brother, Arthur Stevenson, was placed in complainant's position as acting manager or assistant manager of the industries. Certain negotiations which will be hereafter referred to, were had, and efforts made from time to time to settle the difficulties between Stevenson and Dowie, which continued until the month of November. They were ineffectual, and the result was the filing of the bill in question.

The original bill in this case is loosely and by no means carefully drawn. The complainant aims to set out the facts relied upon by him, and seeks the relief by setting aside all the contracts referred to, upon the ground of undue influence, and in addition thereto, to avoid the contracts called the public and the private agreements, dated August 4th, 1900, upon the ground that those two agreements were part of one and the same transaction, and, if the complainant signed the private agreement upon the evening of August 8th, he did it, not knowing that he was signing the so-called private agreement; and alleges that the private agreement was not read to him, or referred to, and that he did not know of its claimed existence until about the forepart of the month of June thereafter, when he, for the first time, saw a copy of it in the hands of the attorney for the defendant; that the defendant having signed the papers, they were passed over to him and that he signed all of them without reading, supposing that they were duplicate copies of the public agreement only.

There were some peculiar, if not suspicious, circumstances connected with the custody of Stevenson's copy of the contracts made between him and Dowie, which were delivered by Stevenson to Dowie or to Barnard, and placed in Dowie's private safe the night of August 8, 1900, to which Deacon Barnard was given the combination. Barnard swears he re-

moved Stevenson's papers from the private safe the next day and put them in the safe at Zion City Bank. They all turned up long after the breach between Dowie and Stevenson in Dowie's possession. One copy of the public agreement had detached from it the private agreement of August 4th, probably for the purpose of printing the public agreement. A certificate for \$50,000 of common stock running to Methie Stevenson, which Barnard swears he issued after Stevenson left for England and placed among Stevenson's papers left with him (Barnard) and which he swears he gave to Stevenson with Stevenson's other papers on the latter's return from England in the next November or December, was also found to be in Dowie's possession after the commencement of this suit.

The manner in which these public agreements were found to be in Dowie's possession is explained by Dowie in the evidence adduced on his part, and may in part be accounted for upon the theory that Barnard left the same in Dowie's safe at the time he says he transferred Stevenson's papers to the Zion Bank safe.

On account of the unreliability of complainant's evidence as to what took place upon this night of August 8th, 1900, when the papers in question were signed, it would be contrary to the weight of the evidence to hold that Dowie obtained the possession of said papers by any trickery on his part, or by the fraud of any one connected with him; and for the same reason the court would not be justified in concluding that complainant's signature to the so-called private agreement was obtained by any deceit or trickery practiced upon him at that time, as alleged in his bill of complaint.

A charge of actual fraud must be clearly proven and suspicious circumstances alone are not sufficient, but are of little importance if a fairly reasonable explanation of them can be given.

The court should say here and does say, that from many years' acquaintance with Mr. Packard, the defendant's solicitor, that the court knows him to be incapable of practicing any trickery or any intentional deceit in any transaction.

If the complainant is entitled to any relief by reason of what took place upon the night in question, it must be upon some other ground than the specific ground alleged in his bill, that his signature was obtained to the private agreement by any trick or actual fraud connected with the obtaining of such signature.

Let us now consider the real question in this case, whether there was any "undue influence" exercised by defendant Dowie over complainant in the transactions complained of, and if so, to what extent, and the relief, if any, that complainant is entitled to.

Where the relief claimed does not arise by reason of physical force or trickery or other actual fraud, but from what is known as constructive fraud (of which character is that known as "undue influence") the evidence necessarily takes a wide range.

The existence of "undue influence" cannot be determined by the assertion or denial of the parties upon the witness stand. It involves the question of the *relative condition of the minds of the respective parties*, at the time of the transaction complained of; this can only be ascertained by a searching investigation into the social, business and spiritual relations of the parties during the entire time of their acquaintance and a careful consideration and analysis of the evidence bearing upon such relations.

It is not the province of a court of equity to grant relief against any contract, however absurd or improvident it may be, if it was entered into and executed by the party asking the relief, in the free and uncontrolled possession of his mind; that is, if they are pure, voluntary, well understood acts of the mind of the party executing the same—unless such contract be void upon the ground of being opposed to public policy,—the public good, in other words.

The providence or improvidence of a contract is an ingredient to be taken into consideration, but does not, standing alone, justify the interposition of a court of equity to relieve a party from the consequences of his own folly.

In passing on the question of the alleged undue influence

of John Alexander Dowie over the complainant Stevenson in the transaction in question, it is necessary to review in detail the relations that actually existed between the parties commencing with their correspondence which began in 1894.

The testimony showing the relation between the parties consists largely in written evidence; letters which passed between the parties at a time when no litigation was contemplated. Letters are always valuable aids in arriving at the truth; in fact, they may be said to be milestones upon the road to truth. They do not forget or "disremember"; they have no memory; they cannot color their evidence; they speak the honest truth as of the date they are written, and are free from all influences that actuate the living witness.

The complainant Stevenson, carrying on his business at Beeston, had sent to him the first issue of the paper published by John Alexander Dowie, entitled "Leaves of Healing," with which he appears to have been much pleased, and in his letter written a few days after receiving the paper, he stated that he read it to his people (meaning those of his employees and others who were accustomed to assemble in his house and hear sermons from him) "last night, amidst shouts of hallelujah and amen, together with tears of joy."

This letter, being the first letter written, was received by the defendant December 11, 1894. After stating as to their own meetings, the number per week, etc., the complainant says "I am engaged in business as a lace manufacturer. * * * Our people are really a people of prayer. Some meetings we never rise from our knees. The dear Lord is blessing souls in saving, but we cannot seem to make any headway in healing. Sometimes I have laid my hands on people and they have been wonderfully healed, and then it has been quite a long time before another has been successful." And he does not know the reason why. Refers particularly to a dear girl, Lizzie Daubney (of whom more hereafter) suffering from curved spine, who has been benefited but not healed; "we really do want God to work with the signs following." "If God would permit, I would so like to take a trip to see you and bring Mr. Moody and some of

my workers. * * * Do you pray for souls and claim their healing if they do not ask? Or do you leave it until they do ask? * * * I am very perplexed about some cases, and I often wonder if I am touching holy things with unholy hands; or, in other words, doing priestly work without priestly authority." Winds up by asking Dowie to send him twenty-four copies of the Leaves of Healing, first issue, and enclosing two pounds, post office draft.

To this letter John Alexander Dowie, upon the next day addressed a letter to complainant, commencing, "Dear Brother in Christ." This letter is very long, about twenty-five hundred words, and with other letters of the defendant, as also do the letters of Stevenson, pretty clearly indicate the mental characteristics and peculiarities of the two men.

In this letter the defendant acknowledges the receipt of the two pounds sent him by Stevenson, and refers to the late Dr. Boardman, who had published some work upon divine healing, and says that Dr. Boardman made a great mistake in associating himself with a medical practitioner in writing his book, "I am the Lord that Healeth Thee," and in claiming that sanctification must precede healing; that this book has done great injury to the cause of divine healing by reason of the erroneous position assumed. "We have long taken the most extreme position in this matter, believing that truth is always extreme, and have taught with regard to these three points: (1) That God never intended vegetable and mineral poisons to be used as healing agencies, and that doctors and surgeons, with their drugs and their knives were entirely needless for a child of God. * * * That sanctification does not precede healing. * * * That no one has a right to witness to salvation who is not saved from sin, and no one has a right to witness to healing who is not saved from sickness." Also says, that he is a realist, not an idealist. He is pleased to see that Stevenson, "realizes that the talent for business is a talent for God," and that God first called him (Dowie) to His ministry, taking him from the counting house, and from active and successful business life.

Says that he is "praying with on an average more than a thousand persons a week; that during the week he has seen more than eight hundred seek salvation, and has laid hands upon nearly five hundred, although he has not yet reached the middle of the week; says his time does not permit him to dictate many letters as long as this, but, "I have been impressed that your letter is not an accidental but a providential, communication. * * * You have said you would like to talk with me and I very heartily invite you to come over and talk. * * * *I have under God committed myself to the formation and establishment of institutions of a permanent character in America* in connection with my ministry in the Lord." This letter is written from 6020 Edgerton avenue, Chicago.

It is evident from these two letters that they were striving along the same lines as regards the so-called divine healing, or healing by the aid of prayer.

It appears that Stevenson responded to Dowie by a letter of the first of January, which is not in evidence; that Dowie responded to that by a letter dated January 16, 1895, acknowledging the receipt of Stevenson's letter and twenty pounds. "I notice that you ask me if I could help you in some of your difficulties, and I very willingly shall endeavor to do so." Then he says, "It is manifest that *your difficulty here is that which besets the churches generally, the want of consciousness of authority; the failure to be able to command in the name of the Lord, and to expect obedience upon the part of those who are convicted.*"

"My best answer to you upon this point will be to give you my own experience. When I preach the Word, *I preach it with authority.* * * * The whole object of my discourse is, first, to create conviction of sin, and then, to demand confession and forsaking of sin and immediate surrender to God. Hence I do not adopt the course of persuasion merely, although I do endeavor to persuade men of the righteousness of God and of their own relation to Him by all the arguments that He enables to use; but when the discourse is finished and we bow our heads in prayer, I close my

petition to God for all the unconverted, with a call to repentance, *which I deliver in an authoritative manner*, and with the conviction that I have a right to do so. I tell them that *God now commands them to repent*, and therefore in His name I demand that they shall do so then and there by rising, and in answer to my questions, declaring their hatred of sin and their determination to forsake sin; to make restitution to those whom they have wronged, and confess. Having done this, and received their word that 'by the grace of God they will,' I lead them in prayer and ask all who desire to be right with God to follow me in that prayer. You will see a specimen of such a prayer in Leaves of Healing of a recent date.

"The results which follow this course are very great. In some meetings I have seen as many as two thousand persons rise and thus openly confess and forsake sin; and it is, I presume, a fact that there is an average of about a thousand such open confessions made every week," and adds, "Of course, those who take that position *must have the divinely given authority*, and it is vain for one to assume it to whom God has not given it." Says that, should he come to this country, it would be well for him to arrange matters so that he could stay several weeks, "in one of our homes, * * * at the same time I recognize that it is not wise to take such a journey unless you are clearly guided by God," etc.

Desires him to tell all his people "how fully I reciprocate that tie of love which binds all who are one in Christ together with a bond far stronger than the tie of blood. The blood of Christ is a stronger bond than the blood of family relationship." Writes of a project that he has had in mind to take with him in an encampment at Jerusalem on the first of January, 1900, at least five hundred persons, and to have an international praise and testimony meeting, and conduct a mission for some time.

Refers to passages of the bible predicting such a meeting, and says he is not given to dreaming of dreams of a fanciful kind, but "I am I hope *practical* in all my undertakings."

The evidence in this case fully sustains his allegation as to his being a practical person.

Concludes by declaring that he shall not renounce his citizenship and become an American citizen, and that he has no less than five secretaries and still cannot keep up with his work.

On February 1st, 1895, Stevenson replied to Dowie's letter of January 16, 1895, and says: "Your letter has helped me very much. I have seen more than once the truth of what you say that 'it is in vain for one to assume divine authority,' for anything, except it is given by God. * * * Am I so divinely authorized? I think not, although I do bless God for the little work He permits me to do, yet it fails to produce manifest results, such as is the case with you, and what my heart longs and craves for." He says he is praying for it, intensely, daily and hourly. Asks him to name a date when he can join them in prayer. "I have felt for some time God was going to do something with me, but have said very little about it to any one. * * * One thing certain, God has me in His hands, and I am, so far as I know, willing for Him to use me as He pleases. I feel confident God will bless the business still more, enabling me to make money for the work. This will be my delight." Asks Dowie to pray for him that he be guided aright, and says. "I am greatly indebted to you for writing to me, taking so much interest in me to answer my letters so fully. * * * You cannot tell how much your letters help and encourage me. Will you specially ask God to anoint me for the work here? I greatly long to be used of God in this country, and I fear to go forward before He sends me. * * * I feel somehow greatly drawn to you in the Lord. Although we have never met in the flesh, I trust God will open my way to do so."

Then appear two short letters of Stevenson to Dowie of March 19 and 28, asking for certain back numbers of the *Leaves of Healing*, and for "*Divine Healing Vindicated*," and other books. Other letters written by Stevenson be-

tween March, 1895, and December 7th, 1899, are not produced in evidence, nor are any letters between those dates written by Dowie if any he wrote.

It appears that the young lady referred to in the letters as Elizabeth Daubney, whose spine was affected, came on from England to Dowie's Home, for treatment, about the month of July, 1899.

She states that Dowie repeatedly asked whether she had heard from Mr. Stevenson, and stated to her that he had himself had a pleasant correspondence with him, but that he had been too busy to write him.

Stevenson wrote to Miss Daubney a letter in the fall of 1899, and sent her his photograph, and also some specimens of lace, saying she might, if she wished, show the same to Dowie, which she did.

Dowie thereupon exhibited this lace at one of his meetings to his congregation, and spoke of the probability of the establishment of lace industries in the coming City of Zion.

At about this date Dowie himself received a letter from Stevenson written December 7th, 1899, in which he says, "I am sending you your New Year's gift." The New Year's gift consisted of a sum of money, which was contributed by members of the family whose names were attached to the letter, each one contributing a dollar (twenty-six dollars in all) except Samuel Stevenson, who contributed fifty dollars. He regrets that his eldest brother, William, is not yet converted, but says, "I send Leaves of Healing weekly to him, and as a result they have just discontinued eating swine's flesh. * * * I am very much persecuted here, they have for many years called me "Faith Healer" and "Anti-Pork Eater." * * * We daily pray for you. * * * I wish many times my boy could be educated at Zion."

After the receipt of this letter Dowie sought an interview with Elizabeth Daubney, appointed an evening for that purpose. In that interview (which lasted fully two hours) Dowie occupied the time in questioning her as to Stevenson, his home life, his family, his business methods, asking and obtaining from her all possible information concerning Ste-

venson. Dowie admits this interview and the correctness of Miss Daubney's statement, saying himself upon the stand that he went into the subject of Stevenson "very exhaustively." It is a reasonable inference from the evidence, that Dowie at this time determined, if possible, to get Stevenson to bring his lace industries to this country, but not with the intention of swindling him out of the same, as charged in the original bill.

Immediately after his interview with Miss Daubney and under date of December 20, 1899, Dowie wrote to Stevenson a very long letter of over three thousand words, acknowledging the receipt of the letter of November 23rd, (which is not in evidence) in which he says: "This was the decision for which I have been long looking and praying in your case, namely, that you might be led by the Spirit of God to enter into our fellowship, to come to Zion spiritually first, so that in all its glorious fullness you should truly be one with us in all the aims of Zion for the redemption of humanity.

"It may seem strange to you that I have not answered your letters, and still more strange when I tell you that there are none of my correspondents in Europe, and none in England in whom I had more interest than in yourself; for from the very beginning I have prayed that God would lead you to Zion and give you the desire to establish your beautiful industry among us as one of the leading features of Zion's manufactures; * * * my heart has been drawn to you all the way through, and it has been so with all of those with whom I have conversed about this matter, and it has given them great delight to know that you have now made application for fellowship and that you are coming to Zion." He expresses his gratitude to God for Stevenson's decision concerning the doctrine of eternal punishment, or rather of eternal hope. It appears that Stevenson had previously written to Dowie that that was his chief difficulty in surrendering himself to Dowie's religious views, but that some letter of Dowie had converted him upon that point. Dowie speaks of it as a point "at which all hindrances were swept away."

He then quotes scripture to show that "the power of Jesus extends over *all flesh*," etc.

In this letter he speaks of making it a joy "to gather together from the east and from the west, and from the north and from the south, into cities of Zion in every land, which cities shall be the training ground for hosts of Zion messengers to all the earth," etc., and "I have long been convinced that until the theocracy was proclaimed and a people brought together who would declare that Christ, and Christ alone, was their King, that while living peacefully and submitting themselves to every ordinance of man, *so far as it did not conflict with the law of God*, they would at the same time proclaim the supremacy of that law, and demand submission, unconditional and universal, to the claims of God. Such a people must be created, for outside of Zion they do not exist, so far as I know. * * * We aim in Zion to create, not merely *high Christian character in a few, but high and noble and pure and holy life in all*. * * * I believe it is possible, and indeed I see it brought out before my eyes, that a whole people can be organized into a united army for the extension of the Kingdom of God even while they pursue their daily calling, often in secular life, and maintain happy homes and raise Godly families; * * * it is only *within a short time that I have realized what my mission is*, although I am quite aware that still fuller revelation of His will awaits me when I have fulfilled the task so graciously assigned. * * * God is fulfilling the surer word of prophecy in sending forth the call to repentance, faith and obedience. * * * In preparation for 'the times of the restitution of all things which God has promised by the mouth of all his holy prophets since the world began.' * * *

"The establishment of the Christian Catholic Church has been for Zion in all the lands. * * * And now this brings me to the place where I feel, as your general Overseer, that it is my duty to address to you a call to service. It is this: Come as soon as ever you can to America, and be my guest in Zion Home, and see the site of Zion City, and investigate for your-

self the condition of your special manufacture and the prospects for success of it in America.

"This seems to me to be the wisest course to pursue. Either here or in Great Britain a large capital must be raised no doubt, in addition to what you have for the establishment of your industry on so great a scale as would be necessary to make it a leading industry in Zion City. * * * I want you to bring with you the introductions which will enable you to ascertain the conditions of the lace manufactories of America." Asks him to talk with any Christian men in England who would be likely to place capital in such an enterprise, although he warns him not to commit himself. "Sell your skill and brains no longer to financial Shylocks." Writes that he has sent him a telegram that day which will read as follows: "Welcome to Zion. Letter sent. Remember night with God. Come soon." The postscript contains an acknowledgment of a letter of December 7th, with draft of fifteen pounds, ten shillings, and returns thanks for same. Speaks of the fact that the Chicago Chronicle has discovered the site of Zion City, which had been kept secret up to that time.

Mr. Stevenson, while upon the stand, testified as to the contents of the letter of the 23rd referred to, said letter not being produced, in substance, that he wrote to Mr. Dowie, telling him about his troubles with Frank Woodward, to whom he owed six thousand pounds, and that he suggested to Mr. Dowie whether he could loan him this six thousand pounds, "because I felt I would like to give him more of my profits, give him a good large share for the loan of his money."

There were offered in evidence some of the letters brought by Stevenson, or sent at his request to Dowie, one from Simon May & Co., of Nottingham, another from Edward Hallow; one from S. I. Bembridge, one from George Middleton and one from Frank Woodward; all testifying to complainant's fine business standing and character for honesty and integrity and ability as a lace manufacturer.

Another letter was put in evidence that was sent by Woodward to Dowie under date of July, 1900, referring to his previous letter to Dowie, and stating a conditional withdrawal of his former letter, to which reference will be made hereafter.

Stevenson arrived in Chicago the — day of January, 1900, and upon his arrival at Zion, he found a letter from Dowie awaiting him, stating that he had written to Deacon Judd and Deacon Sloan to pay him every attention in their power and take him out to see the city, and "I have a very strong conviction, my beloved brother, that your beautiful industry will be one of the most prominent manufactures in Zion City." That should he desire to come out and see him at Ben MacDhui (from which place the letter was written) he invites him to come as he, Dowie, will not return to Chicago until the 26th.

Within a few days after his arrival in Chicago, Mr. Stevenson went to Ben MacDhui, where he remained the greater part of his time. Dowie, being in Chicago, writes to Stevenson under date of April 5th, 1900, to say he has directed Mr. Packard to prepare the necessary papers of incorporation with capital of one million dollars, to be entitled "Zion Lace Industries," and that it will be filed at once in Springfield with his own check for \$1,000 fees. That he has found it "necessary to make some changes in the proportion of capital stock, which I must acquire in the concern on behalf of Zion, but I have made no changes whatever in the proportion that is assigned to yourself." Writes him of the success on the last Lord's Day, receiving eighty-four new members, etc.

Stevenson replies to this on the 6th of April, hopes he will succeed in taking in the lake front Dowie has spoken about; that he, with Mrs. Dowie's consent, has been acting as clerk "of your works," then proceeds to suggest various improvements as to the sloping of the lawns, cutting down hills, etc., so as to give views, and says: "My dear little girl is better and is very dear to me. I am so glad to have had this nice time with her." (The "dear little girl" is supposed to be "Miss Methie Dowie.")

Two or three days after his first arrival at Ben MacDhui, Stevenson testifies that Dowie asked him into his private office one evening about nine o'clock, and there questioned him very closely as to his life, his mother, his brothers. They had prayed together. Then he told him all about his business, that he was not an educated man, a selfmade man, told him all that he could, kept nothing back; gave him the testimonials that he had brought from England, etc. Then they prayed again. "Mr. Dowie, in speaking of the work, wept, and said his heart was in the work of the Lord, and he was glad to have me there, and he wanted such men as myself to help him in this great work; men who were not only Godly men, but men who were successful in business, and he was very glad that I had come; and he commanded me then to come to Zion and to help him in this work, and to be his righthand man."

Stevenson told him he would have to sacrifice a great deal, his friends and his work in England, and suggested whether he couldn't work the business in England and send Dowie more money so as to be associated with him more closely. To which Dowie replied, "No, I want you here with me. You can do more good in this country and help me to build up Zion City, and your lace industries will be a new thing here; and you are in sympathy with my views so much, that I won't have any trouble with you in getting you into my mind and my way of thinking." This conversation lasted till three or four o'clock in the morning. Stevenson says, that "He spoke very kindly to me and put his hand on my head and blessed me in the name of the Lord, and I asked him to pray for me that the Lord would guide and direct me, because I did not want to take this step unless it was clearly shown to me by the Lord."

The next week Stevenson returned to Chicago, investigated the stores, prices of selling laces, etc., and attended meetings at the Tabernacle; was often at Zion City.

Dowie introduced Stevenson to the audience at these meetings, and told the people that Stevenson was coming to America. Stevenson wrote him a letter in which he re-

requested him not to make any statements in public in that regard until they had further arranged.

Stevenson testified that he had a number of conversations with Dowie during January, February, March and April, and that he told him he wanted to be quite sure in his mind before he consented that it was God's will, and speaks of one all night session, and one or two sessions that lasted two or three hours.

In one interview which has been referred to at Ben MacDhui, he testifies that Dowie says: "Why, if you come here, you will be an overseer, the lace industries would be so large that you will be an overseer in such a large undertaking." That he ordained him a deacon and officer of the church before he, Stevenson, left Chicago, on his return to England.

It appears that in February, 1900, an exhibition of laces that Stevenson had brought over of his own manufacture, was had in the "Hall of Seventies," and thousands of people saw those laces. Stevenson was there every day, explaining, and telling them all they wished to know about the Zion Lace Industries, and in one of these meetings in that hall he addressed the people about the industry and about his work in England.

In one of these all night sessions, after they had finished their business talk at about 4:30 or 5 a. m., Mr. Dowie asked Stevenson if he had any one in England in view of marriage, and he told him, no, but Dowie brought Stevenson to confess he was in love with Dowie's sister Methie. Dowie told him he could not have her. Then Stevenson replied, "If you don't think that is a good thing for me, you pray to the Lord and ask Him about it, and if you don't believe it is right, why, no more need be said."

It appears that about two days after this conversation, Stevenson and Miss Methie Dowie became engaged to marry.

On the 11th day of April, 1900, Dowie wrote a general power of attorney, "To Whom It May Concern," stating that Stevenson had been appointed managing director of Zion Lace Industries, Zion City, near Chicago, United States of America; that the association was incorporated under the

laws of the state of Illinois, and capitalized for one million dollars, and the factories to be built upon a splendid situation on the shores of Lake Michigan; that Mr. Stevenson was authorized by him, Dowie, to enter into contracts and to place orders for machinery and material of every kind. Gives reference as to his own financial and business standing to the Bank of Scotland, London, who are agents for Zion City Bank, and signs said document, "John Alex Dowie, President Zion City Bank, Zion Land & Investment Association, Zion Lace Industries." "This certifies that the bearer, Mr. Samuel Stevenson, is a duly ordained Deacon in the Christian Catholic Church in Zion."

Also a letter of the same date written by Dowie, directed to Mrs. Ann Stevenson, the mother of Samuel Stevenson, in which he tells her of "his eventful three months' visit to us in Zion, which is terminated this day in the making of an agreement by means of which he transfers all his interests in business to this country, and will be associated with me in the establishment of a great Zion Lace Industry," and of Stevenson's engagement to Miss Mary Dowie.

There is evidence tending to show that Stevenson was exceedingly cautious about entering into any agreement to sell or remove his factory to America, and that he complained that he could not get a definite offer or proposition in reference thereto from Dowie, and to the effect that he intimated that unless he did within a very short time, he should return back to England. Dowie and Stevenson arrived at an agreement which was incorporated in the contract dated April 12th, 1900, and the next day Stevenson left Chicago for England.

In the opinion of the court the contract of April 12th was not only *not* an unreasonable one, but was a highly beneficial one to Mr. Stevenson.

The evidence tends to show that the value of Stevenson's plant in England, without regard to the good will was about \$60,000 to \$65,000. By the contract of April 12th he sold to Dowie a certain part only of its machinery,—the most valuable part, his patents and patterns for \$50,000, reserving

the right of selling for his own benefit certain parts of the machinery not sold to Dowie then remaining in England, which he afterwards sold to Dowie for \$35,000.

By the contract of April 12th Stevenson was to attend to the transfer of the plant to America and both parties apparently agreed that the so-called good will and the loss that Stevenson might sustain by reason of such transfer, including his services in making the same, was worth the sum of \$100,000 *in stock* in the proposed corporation, so that in effect he got according to that contract, \$50,000 for part of his plant; \$100,000 in stock of the corporation of one million dollars that was to be formed. Stevenson, upon the stand, testified he was satisfied with that contract, and his amended bill, which he after the argument has asked leave to file is founded upon the validity of said contract of April 12th, 1900.

Before said motion was made, the court, in preparing this opinion, had decided that the contract was valid, and that no "undue influence" was exercised by Dowie.

In order to determine whether there was "undue influence" exercised by Dowie over complainant, which induced the execution of the two agreements of date August 4th, 1900, it is necessary to examine into the further relations, social, business, and spiritual, of the parties, from the execution of the agreement of April 12th, 1900, to the 8th day of August, 1900 (when the agreements of August 4th were executed), and all the evidence bearing thereon.

During Stevenson's first visit to this country, extending from about the 20th of January to the 12th of April, 1900, several articles appeared in Dowie's *Leaves of Healing*, exploiting the proposed Zion Lace Industries and the exhibition of laces brought over by Stevenson referred to, and in all these articles much was made of the fact that they were to be under the management and control of Samuel Stevenson, who was praised in the most fulsome language as a skilled manufacturer and successful business man of which the following is a sample, dated February 10th, 1900. Speaking of the lace industries, Dowie says: "When all things were

ready, we cabled to Europe for a captain of Zion industries upon whom we have been fixing our eyes for *about five years*, Samuel Stevenson, a successful manufacturer of Beeston, Nottingham, England, a member of the Christian Catholic Church in Zion, and a man of much skill, many inventive faculties and resources, and great executive ability."

In another issue he speaks of Deacon Samuel Stevenson having left Chicago for England, and "we expect to welcome him back to this country early in July next."

The fact that application had been made for the incorporation of the Zion Lace Industries, with capital of one million dollars was noticed, and that Mr. Samuel Stevenson was appointed managing director and was in England then attending to the business.

And in the same issue notice is given that although many applications have been made for the purchase of stock in the Zion Lace Industries, none had been sold, but the controlling interest had been acquired by Dowie in behalf of Zion, and that books for the sale of the stock would soon be opened.

The evidence shows that application was made for articles of incorporation on the 5th day of June, 1900, at Springfield, Illinois, signed by John Alexander Dowie, H. Worthington Judd and Samuel W. Packard; the necessary authority issued, subscription books opened, Dowie subscribing for 9,996 shares at \$100 each, Charles J. Barnard, Carl F. Stern, H. Worthington Judd and Samuel W. Packard one share each; that papers showing that the incorporation had been completed and a board of directors elected on the 4th of June, consisting of John Alexander Dowie, H. Worthington Judd and Charles J. Barnard were filed with the county clerk on the 5th of June, 1900.

The publications in the Leaves of Healing in regard to the Zion Lace Industries continued at intervals after Stevenson returned to England, and many of them contained the most rosy views in regard to such industries. In the June 9th issue, the editor, Dowie, makes reference to the incorporation under the laws of the state of Illinois, predicts it will be a great dividend-payer and refers in complimentary terms to

Stevenson and his success in carrying on the lace industry in the old country. This is the publication which caused Woodward to write the letter referred to heretofore, recalling his letter of recommendation of Stevenson.

Stevenson wrote to Dowie at frequent intervals from England, reporting the progress he was making as to the transfer of the plant, the engaging of experts, ordering new machinery, etc., all of which letters clearly indicate that he had come to believe that God was guiding his every step and that he was doing God's will in the work of transferring the lace industries to Zion.

His letters upon his return generally end with, "Yours faithful in Jesus," in place of "Yours sincerely in Jesus," as theretofore.

In one of his letters he speaks about having paid off Woodward and says: "I told him (Woodward) I had met a lady out there and was determined shortly to be married. I was going to manage a large dry goods establishment, was to take out my two brothers, some machinery," etc.; that he had asked Woodward to write Dowie a letter as he wished his friends down at Methie's home to be assured of the fact that Methie was marrying an honorable man, and he says, "Woodward evidently thinks you are Methie's father, and I am going to manage your business, as you are an old man," and he desired Dowie in replying to Woodward, to say nothing about what we are doing, as he, Woodward, had sent for him and wanted to buy his business. And in the same letter in which he relates the untruth told Woodward, he concludes with "I feel God is with me. * * * You must be praying for me, I feel sure, I am so happy. * * * People are calling me a fool and many things, because I am leaving such a good business, etc. * * * They say I must be mad now and clean gone; no one but a fool or a madman would do such a thing, leave such a trade and business, they say, but I smile and go on."

Dowie responded to some of these letters in his old style, and in one of them tells how he has made arrangements for his party of ten, consisting of himself, wife, son and daugh-

ter, Stevenson and his wife, making six in the first cabin; and Miss Gaston, Carl Stern, O. T. Spreicher, private secretary, and Ernest Williams, expert stenographer and photographer, making up a party of ten, and recites, apparently with great glee, a deception practiced upon the steamship company, in which he managed to get his entire party the privileges of the first cabin (which was not allowed by the ship's regulations) by passing off the last named persons as servants or valets.

It is evident that in the incidents referred to, the commercial instincts of both Stevenson and Dowie got the better of their religion.

Stevenson in one letter speaks of Dowie's contemplated visit which Dowie had told him had been fixed, to start from this country the 14th of August, but "all the people I have spoken to ask me why you use such very strong language, they think it very dreadful to say 'you dirty devil,' and use such words as 'cur' and 'infernal liar.' * * * But, however, they believe you are a man of God and that the signs do follow, and so they are just waiting to see and hear you."

In another letter he says, "It is remarkable to all how wonderfully God is working for me."

The letters referred to, written by Stevenson while in England upon his return trip, manifest an increasing fixed conviction that he is being guided by God, and that it was the will of God that he should do the work that he was engaged in. They show an increasing and growing affection and confidence between him and Dowie.

Stevenson, under date of June 21st, 1900, writes to Dowie that he is obliged to arrange to bring out the four extra machines, "as I found I could not sell without losing extra much." And that he has a nice set of experts promised to go. Tells of his going to Scotland and other places and of the great facilities he enjoyed for seeing the operations of other factories. Among other things he says that at one factory, where he saw a thousand girls working a thousand weaving machines in one room, "God made this man (the manager) willing to take me through, a thing unheard of

before," and that he had a similar experience and had obtained some valuable information at Manchester, all of which he attributes to the divine efforts to aid him in his work.

Stevenson arrived at Zion Home on his return trip to England, on the 10th day of July, and in a day or two thereafter left for Ben MacDhui, Dowie's summer residence.

After Stevenson's return from England, he was put very prominently forward and exploited in connection with the contemplated Zion Lace Industries. Meetings were held in which he told of the progress that had been made and a very considerable enthusiasm was aroused by means of editorials in the Leaves of Healing, and reports of such meetings.

On the 24th of July, Stevenson was married by Dowie to Methie Dowie in Zion Tabernacle in the presence of three thousand people, and a fulsome account given of the same in the Leaves of Healing on the 28th of July, 1900. In this same issue he states that "Zion City Bank will soon issue a circular and invite subscriptions for \$400,000 of Zion Lace Industries stock.

"We have determined not to go forward with the incorporation under the laws of the state of Illinois, but to establish the industries on the basis of an agreement between ourselves and the stockholders, as in the case of the Zion City Bank and the Zion Land & Investment Association. * * * We may say for the information of our friends, who are greatly desiring to enter into an association with us in Zion Lace Industries, that we shall issue stock at \$100 per share, guaranteeing a minimum interest of six per cent. for the first year, and an almost certain dividend for six successive years of one per cent. annual increase, asking the dividends to increase therefor to twelve per cent." The "We" must be the editorial "we," as it does not appear that Stevenson had been consulted about this publication.

In the same issue Dowie calls attention to Cashier Barnard's advertisement on page 425 of the same issue, and continues: "We frankly tell our many friends that this first issue of Zion Lace Industries stock of \$400,000 will be very rapidly subscribed for, and that all who desire to enter into

co-operation with us in this splendid industry, had better send in their applications as soon as possible."

Describes the wedding four days before, and says: "Deacon and Mrs. Stevenson have crossed Lake Michigan to our summer home of Ben MacDhui on White Lake. They will return to the city in time to attend our closing discourse on Lord's Day, August 5th, when he (Stevenson) will be present and speak a few words at the farewell meeting on Monday, August 6th, and to take part with us in our final reception at Zion Home on Tuesday evening, August 7th." That, "God willing, we will leave Chicago on Wednesday, August 8th, for New York, from thence to sail * * * on the morning of Saturday, August 11th."

Stevenson returned to Chicago at the time indicated, and some sort of talk or negotiation was had between Dowie and himself and Packard, in regard to the preparing of the articles of association, indicated in the publication last referred to, but it is not shown that he knew of such publication. The evidence tends to show that while Stevenson suggested some changes in the phraseology in the wording of the public agreement, the two agreements were ultimately prepared by Packard, substantially in the condition in which they were signed, and were brought by him on the evening of August 8th to Dowie's home, that being the last evening before Dowie and his party, Stevenson and his wife were to leave Chicago on their trip to Europe. It appears that Dowie was in Chicago; and Stevenson and wife were at Ben Mac Dhui from the day of the wedding, July 24th, up to August 5th, and were down town in Chicago shopping on the 8th of August, up to five or half past five of that day, and upon their return to Dowie's home, found Dowie and Packard awaiting them.

The evidence as to what took place on that evening of August 8th is conflicting, the weight of evidence tending to show that either the so-called public agreement was read, or the substance of it stated to the complainant, and some blanks filled; Attorney Packard stating that the reason for the blank as to the price agreed upon between Dowie and

Stevenson for the four extra lace machines, which he had brought over from Europe, was unknown to him; that when it was stated to be \$30,000, he himself suggested as hereinbefore recited, that it made \$35,000, in order, as he said, to make up the \$50,000, the amount of Stevenson's ante-nuptial note, which he had given to Dowie as trustee, and the payment of which that evening was contemplated.

The evidence tends to show that the so-called private agreement was also either read, or the substance of it stated, but Stevenson swears that nothing was said about such private agreement, and that it was not read, nor the contents stated to him upon that evening. As I have before remarked, Stevenson's evidence as to what took place that evening in regard to said agreement is unreliable, but his entire subsequent conduct was consistent with the idea that he knew nothing of such private agreement until after the breach between him and Dowie, when it was shown to him by Packard in the month of June following.

His testimony shows that he had no clear recollection as to the occurrences of that evening, nor as to any conversations or any talks about the proposed agreement then or prior thereto. Having been married but a few days previously and having been lionized in public and in private as the great lace manufacturer, and living in close communion with Dowie, he was in such a state of excitement, an ecstasy of bliss, that he would have signed any instrument that Dowie might have requested him to sign.

There can be no question in the mind of the court but what the two agreements were signed upon the evening in question by all of the parties signing the same, but the question in this case is not whether Stevenson signed both these agreements upon the evening in question, nor whether he intended to execute them, but the question is how the intention to execute the same was produced; whether he knew the force and effect of the instruments he signed, and also whether full information and advice was given him by Dowie and his attorney, which they were required to give him under the circumstances; whether or not, considering all the circum-

stances surrounding the transactions, when taken in connection with the proof as to the relations existing between the parties, there was such dominion exercised by the defendant Dowie over Stevenson as prevented its being the pure, voluntary, or well understood act of his (Stevenson's) mind.

"The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief where influence is acquired and abused, or where confidence is reposed and betrayed." (Citing the celebrated case of *Huguenin v. Baseley* [17 Vesey, 273], *post.*) "It is specially active and searching in dealing with gifts, but is applied when necessary to conveyances, contracts, executory and executed, and wills." (2 Pomeroy's Eq., sec. 951).

"Whenever two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached, if no such confidential relation had existed.*" (Same, sec. 956).

After commenting upon the doctrine of undue influence in the cases of guardian and ward, trustee and beneficiary, attorney and client, etc., he says, sec. 963, under the head "Other Relations":

"The same general principle extends with more or less force to dealings between physician and patient, a spiritual adviser and penitent, * * * partners, and indeed all persons who occupy a position of trust and confidence, of influence and dependence in fact, although not perhaps in law."

Where the relation is proven to exist, as in the case of the clergyman and his parishioner in *Huguenin v. Baseley*, *ante*, it (the undue influence) is presumed to exist, and the burden of proof or "heavy burden of proof" as it is termed, is upon the clergyman or person occupying the confidential

or fiduciary position to show that in the transaction complained of, the influence had not been exerted, or the confidence reposed abused. But, whether the burden of proof in this case is upon Dowie, who not only occupied the position of clergyman to his parishioner, but also of prophet to his disciple, it is unnecessary to discuss in the view the court takes of the evidence adduced.

The court, in a case of this character, looks, first at the transaction to see whether it is a contract which was a reasonable one, a beneficial one, whether there was a reasonable consideration for the making of it.

While the fact that a contract is unwise, foolish, improvident, will not of itself justify a court in relieving the party from the effect of such contract, yet, if the court can see there is a want of consideration, or a very inadequate consideration, such fact should be taken into consideration with other inequitable incidents in determining whether the party was induced to enter into the contract by reason of the undue influence exerted over his mind by the other party to said contract.

The complainant at that time was in this position: He had a right to receive \$100,000 of paid up stock in a joint stock corporation of one million dollars; he was entitled to receive a balance of \$15,000 upon the first sale of machinery to Dowie. He had brought over with Dowie's knowledge and approval four additional machines for the purpose of their being placed as part of the plant, for the joint stock incorporation of one million dollars, and it was only a question as to the amount which Dowie should pay him for the same.

Stevenson had the right to have all the provisions of the agreement of April 12th, 1900, under which the Zion Lace Industries had been incorporated, carried out. Under that agreement Dowie was not only bound to incorporate the joint stock association of one million dollars, but also, after it was incorporated, to convey or transfer to the corporation, a tract of land upon the Zion City site, containing not less than twenty-five acres, and all the machinery, patterns, good

will and plant purchased from Stevenson, including the patents, for which he (Dowie) was to have \$620,000 of capital stock, \$100,000 of which he was to deliver as full paid stock to the complainant, the balance of the capital stock, \$380,000, to be treated as treasury stock and sold or used for the purpose of putting in further machinery, tools, buildings and appliances.

There was also a guaranty on the part of Dowie that he would either subscribe for or purchase at its par value such treasury stock, or so much thereof as might be necessary (or procure some person so to do) in order to furnish all the capital required by the corporation to enable it to purchase and pay for all buildings, new machinery, tools and appliances, which it might need, and to enable it to successfully inaugurate and carry forward its business to the full maximum limit of its opportunities and possibilities. Therefore, Stevenson had a right to demand, not only a transfer of all the property to the new corporation, but that Dowie should, if necessary, himself furnish cash to the full amount of the treasury stock, \$380,000.

By the transaction contained in these two agreements of August 4th, he, Stevenson, releases Dowie from all his obligations, and surrenders all his own rights thereunder.

Under the incorporation, he would have all the rights of a stockholder under the laws of the state of Illinois; the right to examine books, the right to have the property of the corporation applied for the purposes of the corporation, and that it be used for no other purpose; the right to attend stockholders' meetings, to vote thereat, and the right to go into a court of equity at any time that he deemed it necessary to check or question any *ultra vires* or illegal act of the corporation. He had a right to have the management of the corporation in the hands of a board of three directors.

The public agreement or contract, the only one that was published to the world, and the only one known to the so-called subscribing shareholders, purported to be an agreement between John Alexander Dowie and Samuel Stevenson of the one part, and the preferred shareholders of the other,

and twice speaks of the association as a *joint enterprise*. If it was not a joint enterprise, Stevenson and Dowie on one side, and the preferred stockholders signing the same on the other, in fact, it was deceptive and it is by no means clear that, if it is to be held to be a valid agreement, Samuel Stevenson could not be held liable, either as joint contractor with Dowie, or as having guaranteed by his signature thereto the performance of all the covenants and obligations devolving upon Dowie by the terms of that agreement.

That public agreement, the only one that was published, does not contain one word as to the interest of Samuel Stevenson in the new association, and it is a fair inference from the same, and the public would be justified in believing, that there was some kind of an arrangement or agreement existing between himself and Dowie in the nature of a co-partnership or joint enterprise, not incorporated in the agreement, which induced him (Stevenson) to become a party to the same.

I am strongly inclined to the opinion that in a court of equity, he, Stevenson, would be liable to any person dealing with said association, either as a subscribing stockholder, or as a creditor thereof, for any damages they might sustain in trading, with a knowledge only of said public agreement.

By the new agreement Dowie is relieved from his obligation to buy or cause to be purchased at par \$380,000 worth of treasury stock in the corporation, and does not, in the new agreement, undertake or bind himself in any way to Stevenson to furnish any land or money to the establishment of such industries; and instead of a one-tenth interest in a corporation of one million dollars, Stevenson, under the new public and the private agreement, agrees to receive \$100,000 of paid up stock in a new association; an association which is without any limit as to the shares of stock, which Dowie alone is authorized to issue; it provides for \$500,000 of stock in shares of par value of \$100 each, to be issued to Dowie as proprietary stock; seventeen hundred shares of stock to be issued and to be known as common shares, and authorizes Dowie to issue one hundred shares of preferred

stock, without any limitation whatever, and the new agreement expressly provides that no other shareholder than John Alexander Dowie shall have any title or interest, either legal or equitable, or possession or control of any assets or property, real or personal in said Zion Lace Industries, nor any right, authority or power to make any sale, transfer or disposition thereof, and gives Dowie full authority to manage, lease, sell, exchange, mortgage, and convey from time to time the real and personal property of the industries, or any part thereof, as he shall deem best, and provides that the purchaser or mortgagee shall not be required to see to the application of the purchase money.

Instead of being the owner of \$100,000 of paid up stock in a joint stock corporation of one million dollars capital stock, Stevenson becomes a shareholder in an association, in which John Alexander Dowie owns all of the property, appoints all of the managers and employees, fixes all the salaries, and he is, as such shareholder, without any voice of any nature or kind in the management of the association, or any right, to inspect the books of the association or challenge in any way Dowie's action. This "Zion Lace Industries" association has, legally speaking, but three assets, to wit: (1) The credulity of human nature, which appears to be an inexhaustible asset; (2) The avarice of investors; and (3) A blind faith of members of his church in John Alexander Dowie.

What consideration can it be said Stevenson received for the surrender of his rights under the million dollar corporation? Not one dollar of consideration or advantage to him of any nature or kind can be pointed out. It is all surrender on his part and all gain by Dowie.

It is true that the agreements in question provide for the purchase by Dowie of the four lace machines at \$35,000, but those were the property of Stevenson which were to go into the incorporated company and to be paid for, either by Dowie or by the incorporation. Eliminate the four machines and the payment therefor, and it is apparent on the face of the agreements, that for this change of his situation, Steven-

son received no consideration whatever. It was in legal effect a gift by Stevenson to Dowie of all his property, rights and interests to which he was entitled under the agreement of April 12th, 1900, and all his property rights in the corporation which had been formed thereunder.

Is it a transaction—this of August 4th,—which any reasonable, prudent, cautious business man, uninfluenced by any other consideration than to make a bargain, would have entered into? The answer must be in the negative.

The two men were not equals (irrespective of the question of undue influence) in business capacity or in intellect. In the words of his counsel, Mr. Packard, "Stevenson was no match in business affairs for Dowie; and who is?"

Dowie's attorney may well admit the inequality of the two men. The one a strong man, well educated, of large business experience, having lived in several lands and having traveled much and been brought into contact with all classes of men; the other, Stevenson,—by no means a strong man—of but little education, no business experience and no knowledge of the world outside of his lace manufactory at Beeston, England; the one was truly "no match" for the other.

It is true that the law nor the courts can give a man brains, or make one man equal in business capacity or intellect to another, and if there is nothing more than such disparity between the two men trading, the fool must be left to the effects of his own folly. But when they are unequally matched and there are other considerations entering into the transaction growing out of the relations of the parties, one to the other, the question of fairness of the transaction, as well as the natural ability of the parties, must be taken into consideration.

There is another matter to be referred to in considering what Stevenson surrendered and what he got by the change that was made in the business relations of the parties on the night of August 8th by abandoning his rights under the old corporation, and consenting to go into a new arrangement, and that is, that he is a party to this contract of August 4th, termed the "public agreement," by which he and Dowie

have undertaken (or Dowie alone had undertaken) to carry on an enterprise in a new association which stands of record at Springfield, Illinois, and on the records of this county, of an incorporation provided for in the agreement of April 12th, and which was actually formed, to wit: the Zion Lace Industries.

Was that matter brought to Mr. Stevenson's attention? It is true that the public agreement provides that only Dowie shall be liable for the debts and that notice to that effect be kept posted in the office so that all persons entering there may see the same, but suppose a party dealing with the association, known as the Zion Lace Industries, does not enter into this office, and becomes a creditor of the Zion Lace Industries, relying upon the fact that there is such an incorporation organized under that name, recorded at Springfield, and upon the records of Cook county. There could be little question but what John Alexander Dowie, Samuel Stevenson and everybody connected with the management of the enterprise could be held liable for a debt contracted under such circumstances. It is practically holding out to the world, to those who do not enter the office and see this posted notice, and who do not have actual notice of the articles of association, that this "Zion Lace Industries" is the "Zion Lace Industries" incorporated under the laws of the state of Illinois. As to such creditors, it would come pretty near being a case of "false pretences."

Did John Alexander Dowie dominate the mind of Samuel Stevenson in the transaction of August 8th?

We have traced from the commencement of their correspondence the growth of the spiritual influence exercised by Dowie over Stevenson which culminated in his becoming a member of Dowie's church and the church of Zion, of which he was the recognized head, we have seen that he became gradually at last fully converted to the doctrine that Dowie had upon this earth a divine mission; that Dowie, when he spoke, spoke as he states it, by authority, with the consciousness of authority, with the right to demand or to command in the name of the Lord and expect obedience. Dowie had

told him that under God he had committed himself to the formation and establishment of institutions of a permanent character in America, in connection with his ministry in the Lord, and, in substance, that he expected to gather people from the east and the west, from the north and the south, into the cities of Zion in every land, and that he (Dowie) had long been convinced that "until a theocracy was proclaimed and a people brought together who declared that Christ and Christ alone was their King, and that while living peaceably and submitting themselves to every ordinance of man so far as it did not conflict with that of God, they would at the same time proclaim the supremacy of that law and demand submission unconditional and universal to the claims of God. Such people must be created." for, says Dowie, "outside of Zion they do not exist, so far as I know." He told him that it was only within a short time that he had realized what his own mission was, and that he expected further revelations on that subject.

Stevenson testifies, in substance, that although John Alexander Dowie had his business cabinets and heads of departments, that there was no will in Zion except that of John Alexander Dowie; that he was absolute dictator and no one presumed to question what he said or ordered.

It is true that Dowie himself denies this, and protested, not only upon the witness stand, but in public meetings, that he only ruled by love, but, when he speaks about the authority of God and demands obedience, who in his church would say him "Nay," in spiritual or in temporal matters, connected with the business enterprises which he professes to carry on for the benefit of Zion, and in the cause of his religion?

Upon the stand, on cross examination, he gave an idea of his method of conducting his business operations. He is at the head of thirty-eight different departments of industry in this coming City of Zion, and in Chicago. He conducts a bank, known as the Zion City Bank.

The public agreement of August 4th, organizing the new association was based, to a large extent, upon that under

which the so-called Zion City Bank was doing business. The articles of agreement, as to the bank, were put in evidence, and, in substance, they simply provided that John Alexander Dowie might issue \$100 shares of stock and sell them without limit as to the amount of such issue; he, individually, agreeing to pay interest on the shares so issued, and with certain covenants for the redemption of such shares, similar to those contained in the public agreement of August 4th.

He owns all the moneys and assets of the bank, employs officers and other employees, fixing their salaries, and has the power to make any disposition of the assets of that bank, just as great as any individual has power over his own private property.

And it is the same way with the other industries referred to in Zion. The evidence tends to show that in furtherance of his scheme to build the City of Zion, John Alexander Dowie purchased some five or six thousand acres of land on the shores of Lake Michigan, a few miles north of Waukegan, a sandy desert, and in many places swampy; that he organized the Zion Land & Investment Association, subdivided 850 acres of the land into 50-foot lots, gave 1100-year leases upon each lot, and sold those leases at a price equal, it is stated, to the value of the property; and in five days after these lots were put upon the market, every lot in that 850 acres of land was taken.

The title to the land, it appears, remained in John Alexander Dowie. The title to the land upon which these Industries are to be situated under this public agreement of August 4th, remained in John Alexander Dowie, and it appears in a most remarkable argument—which was published—made by his attorney, Mr. Packard, upon the advantages to the subscribers for preferred shares of stock in that kind of an association over preferred stock in an incorporation organized under the public laws of the state, that he had provided by the will of John Alexander Dowie, that this land upon which the Zion Lace Industries (and the lots referred to were located) should pass to his successor named in the will,

who should appoint trustees and those trustees with their successors were to hold title until "the second coming of our Lord Jesus Christ;"—a rather indefinite period of time, and for that reason obnoxious to the "rule against perpetuities."

But the attorney of the defendant contends that it is a *pious trust* that is thus created. Parties will not be allowed to speculate in real estate, lace industries, and other manufacturing plants under the guise of "*pious trusts*," and thus avoid the rule against perpetuities.

The different departments referred to, at the head of all of which was Dowie, it appears were connected by telephone with Dowie's office, and that no important business was transacted without his approval.

Is it at all strange that his attorney asks in open court, "Who is John Alexander Dowie's equal in business capacity?"

If Dowie believes, as he says he does, in a theocracy, in other words, in a people governed by the immediate direction of the Almighty, like the Israelites of old, and his followers also believe the same, and that he speaks by the authority of God, can it be said that any one of his followers entering into a contract or business arrangement with John Alexander Dowie is not acting under "undue influence?" The law says that "undue influence" shall be presumed in such a case.

Dowie says upon the stand that he rules by love, but, "if they agree to follow my leadership, just as you might agree if you were a member of a voluntary regiment, and the captain says, you know, 'right about face,' then you would right about face, and if you don't, you are put out of the regiment."

He also said as to his methods of doing business with his departments and with his business cabinets: "I determine what ought to be done, *then* I consult them, as to whether they know a better way or not."

Mr. Stevenson said that so far as he knew no one ever suggested a better way than that suggested by John Alexander Dowie, except upon one occasion, and the only one.

when he, at a cabinet meeting, protested against substantially forcing Mr. Packard to become a member of the Church of Zion.

Also, it appears that this defendant has a wonderful power, not only with those with whom he is brought in individual contact, but a power to sway large audiences of his followers at will. When, in the month of June last, in the presence of several thousand people, after a long discourse in which he quoted verse after verse from the Bible to show that the spirit of Elijah was incarnate in himself, and that he was Elijah the Second, and demanded of the audience whether they believed him to be Elijah the prophet, nearly the entire audience arose to their feet and proclaimed their belief in him,—that he was Elijah. The few who did not rise, being so small a number as to be indistinguishable. On more than one occasion he demanded of those in the audience who had been divinely healed, to rise to their feet and more than two thousand persons arose to their feet and testified that they had been healed by divine power. "Did I heal you?" demanded Dowie. "No." "Did God heal you?" "Yes." If they had been asked "Were you healed by Dowie's laying on his hands and praying God to heal you?" the answer would undoubtedly have been in the affirmative.

As the general overseer and the head of the Church of Zion, he collects one-tenth, like the Jewish tithes of old, and not only that, but he insists on liberal donations being made toward the church.

On one occasion he talked to his audience in the following style, which is given as a specimen of the manner in which he talked to his audiences as to contributions.

" 'Shall we put our all in?' said Ananias and Sapphira.

" 'I say, Ananias,' said Sapphira, 'we sold that for ten thousand dollars. We will give them five, but let's tell them it is all we have.'

" 'All right, Ananias.' 'Sapphira, you stay at home.'

" 'Peter, Apostle of the Lord, I come.'

" 'Who are you?'

“ ‘I am Ananias.’

“ ‘And with what do you come?’

“ ‘Five thousand dollars.’

“ ‘What did you sell your land for?’

“ ‘Five thousand dollars. Here it all is, blessed Apostle.’

“ ‘You liar! Ananias, thou hast lied to God and not to man. You have lied against the Holy Ghost. Die!’

“ ‘He died. They wrapped him up, and took him out.

“ ‘O, Holy Apostle!’

“ ‘Who are you?’

“ ‘I am Sapphira.’

“ ‘Well, what have you to say?’

“ ‘Ananias came with all our possessions.’

“ ‘Well, it was your own, could you not do what you liked with it?’

“ ‘Yes, we have devoted it all to God.’

“ ‘You liar! You liar! The keeping back of that five thousand dollars is your death. Die!’ She died.

“ ‘I wonder how many Ananiases and Sapphiras there are in Zion? (Laughter.)

“ ‘All I have to say is this: If I were you, Ananias, I would tramp back to the Methodists. You will be lonely in Zion.

“ ‘Sapphira, I would go to the Baptists.

“ ‘Why? Because you will die in Zion most surely.

“ ‘I will find you out some day, and if ever I do, that will be the last of you, so far as your connection with Zion is concerned, you pair of hypocritical pretenders.

“ ‘What do I mean?’

“ ‘I mean this:

“ ‘I will ask God to take you out, you liar.

“ ‘I do not want men in Zion to say, ‘All I have, and all I hope for,’ and then come with an Ananias and Sapphira consecration.

“ ‘You will notice that the fourth chapter which I read leads up to the fifth, and I am going to preach on Ananias and Sapphira next Sunday.

“ ‘If Ananias and Sapphira come here, they will have a hot

time, and if they stay away, we will know why they stay away, and they will get into a hotter time. (Laughter.)

"I am going to have things restored to Apostolic conditions.

"Is that right?

"Audience—'Yes.'

"General Overseer—Everybody who says, 'All I have, I consecrate to God,' stand right up. (Nearly all arose.)

"Ah, some of you are keeping back part of the price, are you?

"Some of you are sneaking out. You cannot get away from God, though. He will look after you.

"We are right up against some plain and practical questions.

"I ask you the question as you stand here, Do your spirit, your soul, and your body, belong to God?

"Audience—'Yes.'

"General Overseer—Your time, your money, and your talents?

"Audience—'Yes.'

"General Overseer—Your property?

"Audience—'Yes.'

"General Overseer—Your all?

"Audience—'Yes.'

"General Overseer—Are you willing to put all into Zion?

"Audience—'Yes.'

"General Overseer—Then do it quick.

"Oh, but you know, the apostles might not have been good business men.

"Did not Christ make them apostles?

"Audience—'Yes.'

"General Overseer—Did he not give them wisdom?

"Audience—'Yes.'

"General Overseer—Do you not think that they were pretty good business men?

"Audience—'Yes.'

"General Overseer—Did God put me here?

"Audience—'Yes.'

“General Overseer—Well, then, can you trust me?

“Audience—‘Yes.’

“General Overseer—Come along then; roll up your dollars tomorrow, and the next day, and the next day, and the next day. Get in quick.

“Everything must be put into the Ark of Safety in Zion.”

The manner in which Dowie raises money in furtherance of the Zion Lace Industries and the confidence and trust inspired by him through his publications in the Leaves of Healing in exploiting the Zion Lace Industries, are shown by the rapidity with which said shares of preferred stock were sold when put upon the market, none of them, as is stated, being sold to others than the members of the Church of Zion.

The court has heretofore referred to the fact that on July 28th, 1900, the defendant in an editorial article in the Leaves of Healing, exploiting the Zion Lace Industries, called attention to Cashier Barnard's announcement in regard to the sale of the preferred stock appearing in the same issue of the paper, which was as follows:

WE OFFER FOR SALE

\$400,000

ZION LACE INDUSTRIES STOCK,

Shares \$100 Each.

Interest payable semi-annually, at the following rates:

First year.....	6 per cent.
Second year.....	7 per cent.
Third year.....	8 per cent.
Fourth year.....	9 per cent.
Fifth year.....	10 per cent.
Sixth year.....	11 per cent.
Seventh year.....	12 per cent.

STATEMENT.

Estimated area occupied by industries.....	50 to 60 acres
Estimated number of hands employed at the end of five years.....	50,000
Estimated value of property at the end of five years, at least.....	\$5,000,000

The evidence tends to show that with the exception of the erection of a shed, no buildings of a permanent nature had been erected upon the site of the proposed industries at that time, and little done beside the importation of a portion of the machinery, yet it appears that in response to this offer of sale, which was an appeal not only to the credulity but also to the avarice of the investors, there had been realized at the time of the hearing of this cause the sum of \$431,200 actual cash, and it was a disputed question as to whether or not said Zion Lace Industries were then in effective operation, it being admitted that none of the buildings necessary therefor was in a finished condition, and that very much more remained to be done.

Dowie's church, which was organized in the city of Chicago but a little more than five years ago, it was testified, has increased until the number of his adherents is fifty or sixty thousand persons.

Its doctrine, or its creed, if any it has, does not appear by the evidence. It does appear that Dowie teaches that all men must repent, and having repented, they must restore that which they have stolen, or out of which they have defrauded others, and surrender themselves to God, and it must be said of John Alexander Dowie that so far as shown by the evidence in this case, *ex facie* his teachings are not immoral and make for the general good. He teaches and enforces strict temperance among his people; he allows no saloons in the city of Zion; no billiard rooms; no gambling houses; no immorality or vice of any kind, and even the use of tobacco is prohibited among his followers.

It may be that these teachings account to a large extent for the influence which he wields over his followers; they undoubtedly tend to intensify his power and influence over them, but there is a strong inconsistency in the character of this man, which it is difficult to account for.

His manner of speech in the pulpit, as well as in common conversation, is at times violent in the extreme; it appears by the evidence that the complainant's wife was taken sick in England, just before their return to America, and though the prayers of Dowie and her husband were exercised in her behalf, they were without avail; that although afflicted with pleurisy, she was taken on board of the ship, as complainant says, because of her own insistence, she wishing to accompany him on his return to America.

Three days out she died—and it is a fair inference—a victim to her belief in the efficacy of prayer to cure disease.

In an interview between Stevenson and Dowie, which took place about the 18th of May, and which had been brought about in the negotiations for a settlement, Dowie, referring to the sickness of Methie, became enraged to the extent that reciting the circumstances connected with her sickness, he ended by saying to Stevenson, "Before God, I look upon you as her murderer." In the issue of November 9th, 1901, he published in his own paper an article stating that he had removed Stevenson from the office of deacon and from fellowship of the church. He refers to that date as being the anniversary of the death and burial at sea of his sister Mary, and in another publication, a few days thereafter, headed "An Apostate Liar Rebuked," he says that Stevenson "has not hesitated to cast what seems to us a shameful reflection upon his dead wife's memory," probably referring to the charges made in the bill, or purporting to have been made through the statements in the newspapers, and says, "It is a most shameful thing that he should do this upon the anniversary of her death, when he cast her body into the sea, apparently afraid to permit it to come to shore. It could then have been examined, and the real cause of death ascertained."

Upon one occasion, when he made the charge of Stevenson being his wife's murderer, it was in the presence of the two brothers of Stevenson, who expostulated with him after Samuel Stevenson had left, and he retracted to the extent of saying that he meant that he was criminally negligent in caring for his wife in her last sickness.

He often, according to the evidence, made use of expressions which would appear to the world to be unbecoming in a minister of the gospel. His manner is often passionate and violent, even in the pulpit, and there is some evidence tending to prove that in addition to his claiming to have a divine mission, and to speak and command by the authority of God and demand obedience to such commands, that he mingled therewith covert threats as against those who opposed him as overseer of the church, or the work in which he is engaged, which were calculated to inspire terror in those who heard him.

It is evident that he belongs to the church militant, and that he does not observe the injunction given by Him whom he claims to follow—"Whosoever smiteth thee on the right cheek turn to him the other also;" but, on the contrary, to use a common expression he strikes right out from the shoulder.

Stevenson testified that he once believed that Dowie could call down a curse upon him if he disobeyed him, and that he had heard the Miss Daubneys and other members of the church say they were afraid of him; that he heard him say, with regard to the Chicago press, if they went on in their wicked ways, he would pray to God, and that God answered his prayers. Then he recites how some of them died, "this man died, that man died, and this was going to die. He does a great deal by way of suggestion; he does not say it absolutely but you have to take the inference."

Stevenson refers to the case of Dwight L. Moody, that Dowie said unless Dwight L. Moody ceased to fight Zion, he would not say he would live, and that he, Dowie, afterwards referred to the death of Moody. "He took sick on that account, and was never well afterwards, or words to that

effect." This statement, he says, was made in the tabernacle to an audience, and is to be found in the Leaves of Healing.

Stevenson also testified that he commands his people to obey him, because he receives his orders from God, that he is indwelt with God's spirit; that he is acting as God's messenger. He commands all the people to obey him as he obeys God, and then he says, "Because God has given him this authority and confirmation of his work by the sign, they are to help him and bring in their tithes and offerings and help to support Zion; and unless they do, they will be cursed with a curse." And that these statements "can be found in the Leaves of Healing and the Zion periodicals."

Aside from the question of undue influence of Dowie with his powerful will, dominating and controlling the mind of the complainant, a deacon and a member of his church, thereby inducing him to enter into the agreement of August 4th, whereby as we have seen, the complainant was entitled to have such agreements declared of no force or effect,—the further question is presented in this case, whether or not the so-called public agreement of August 4th, for the carrying on of the Zion Lace Industries, is not absolutely void as being opposed to public policy, or, as sometimes called by the English courts, "public utility."

The first case in which it appears that an instrument has been set aside upon the principle of public policy was the case of *Norton v. Reily*, reported in 2 Eden, 286, in which "a grant of annuity obtained by a dissenting minister having spiritual ascendancy over a woman under a state of religious delusion," was set aside, upon principles of public policy.

The next case in which the principle was applied appears to have been the case of *Huguenin v. Baseley*, reported in 17 Vesey, 273; the relief sought was to have the voluntary settlement by a widow upon the defendant, a clergyman, and his family, set aside, as obtained by undue influence, and abused confidence in the defendant, as an agent undertaking the management of her affairs;—the deeds were set aside

upon the principles of public policy and utility, applicable to the relation of guardian and ward.

Although in that case there was a gift by a deed of trust, such deed was held in the nature of a contract by which there was to be paid her an annuity for life of four hundred pounds per annum out of the property, which produced more than that amount, "with remainders to trustees to preserve contingent remainders to his wife for life, to their children, born or to be born, in tail, with cross remainders, and the ultimate remainder to Mrs. Huguenin."

It will be seen by the authorities quoted in that case and the note thereto, that the principles laid down in that case were clearly applicable to contracts as well as gifts. The contract and the interest in the corporation formed in pursuance thereof, which the complainant was induced to surrender to the defendant Dowie in this case, was practically a gift. As we have seen, there was really no consideration for his exchange of his rights and position under the contract of April 12th, for the rights and position which he obtained under the public and private agreements of August 4th.

In the case referred to, the court held that the conveyance was executed under the effect of that which has always been considered in this court as undue influence. And, as to whether the court should undo the instruments in question in that case, the Lord Chancellor Eldon says: "I answer no, if they are pure, voluntary, well understood acts of her mind; but if they have not that character, if they are the result of her notion that this is the true effect of that friendly assistance, that kind, providential interference which she was looking for in the management of her affairs, with advantage and facility to herself; if the conveyance was executed under the effect of that, which has always been considered in this court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if they are confirmed by extrinsic evidence, that they are not the pure, well understood acts of her mind, this court will undo them."

Lord Eldon, after reviewing certain circumstances, pro-

ceeds: "The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed around her as against those who advised her, which, from their situation and relation with respect to her, they were bound to exercise on her behalf. * * * In that view of the case, no evidence out of these instruments could satisfy me that Mrs. Huguenin understood them. I believe, further, that the parties to the transaction did not understand it. Repeating, therefore, distinctly, that this court is not to undo voluntary deeds, I represent the question thus—whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature and consequences, which the defendants, Baseley and the attorney, were bound by their duty to communicate to her, before she was suffered to execute them and though, perhaps, they were not aware of the duties which this court required from them, in the situation in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle, it is necessary to impute knowledge which the party may not actually have had."

These remarks quoted could be used by this court word for word, as applicable in the case at bar, simply by substituting the complainant's name for Mrs. Huguenin and the name of Dowie for Baseley, the defendant in that case. (See *Huguenin v. Baseley*, 2 White and Tudor's Leading Cases in Equity, 597 and note.)

The knowledge which was to be imputed to these parties referred to by Lord Eldon was the knowledge of the legal effect of the instruments, which the woman in that case was induced to sign.

He holds that the defendant and his attorney—whether they did in fact or not—must be held presumed to know all the consequences of the instrument which the woman was induced to execute, and failed to advise her thereof.

It is very evident from Mr. Packard's argument addressed in favor of the advantages of the "association" plan over that of an incorporation, referred to, that he could not have

advised Stevenson of his rights and the legal effect of the transaction of August 4th, 1900. He honestly believed the association plan was better for all parties.

The relations between the clergyman and the woman in that case were held similar upon principle to the relations upon which the courts had repeatedly acted, setting aside transactions between guardian and ward, occurring shortly after the relation ceased to exist. That as contracts and gifts between guardian and ward—made after the relation ceased, but the influence thereof still continued—were not allowed to stand, upon the principle that the public good demanded that such transaction should not stand, so the public good or public policy, demanded that transactions between a clergyman and his parishioner, where the influence of his relation prevailed, were alike to be held void upon the principle that the interest of the general public demanded such holding.

The closing reply of Sir Samuel Romilly in that case, in arguing that the principle that had always been applicable in the case of guardian and ward and husband and wife, should be applied in the case of *Huguenin v. Baseley*, has often been quoted.

He says: "Why does not the principle apply with infinitely greater force to the present case? What is the authority of a guardian or even parental authority? What are the means of influence, by severity or indulgence, in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser; with such an engine to work upon the passions, to excite superstitious fears; or pious hopes; to inspire, as the object may be best promoted, despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness; that good or evil which is never to end? What are all other means to these? Are inferior considerations to have so much effect; and is no regard to be given to the most powerful motive that can actuate the human mind? Though no direct authority is produced, your Lordship, dispensing justice by the same

rule as your predecessors upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest that has occurred, upon this ground alone, from its infinite importance to the community."

And in this case, the question is: Whether it is not of infinite importance in this community, to the public at large, to the public good, not only that this transaction should not stand as between Dowie and Stevenson, upon the ground of Dowie's undue influence over Stevenson, but that it should be held absolutely void as opposed to public policy.

By this public agreement of August 4th, under which these Zion Lace Industries were to be conducted, a corporation was incorporated under that name, elected its officers, received its certificate of incorporation in the county where the industries were situated, thereby holding out to the public (except to those who might be specially informed to the contrary) that the industries were being carried on under such public incorporation, when in truth and in fact, they were being carried on under an association agreement, having no resemblance to an organized state institution. The public would naturally suppose that the "Zion City Bank," the "Zion Land & Investment Association," the "Zion Lace Industries," and others of the thirty-eight associations, of which Dowie was the head, and as to some of which he signs himself as president, were regularly incorporated institutions. The ignorant and unwary most assuredly might be led into trading with them and dealing with these associations under the belief that they are incorporated and under state license and supervision.

But it is only necessary in this case to decide as to the "Zion Lace Industries," which differs from the other thirty-seven departments or associations, in that there is a legally organized existing incorporation of the same name, and as to that association it must be held that the public interests demand that this public agreement of date August 4th, 1900, under which said "Zion Lace Industries" are now being

carried on, be held opposed to public policy, and for that reason void as between the parties to this suit.

What may be the effect of its being held void upon the ground of public policy, upon the preferred shareholders and creditors dealing therewith is not necessary now to determine, as they are not at present parties to this suit.

As to the contention of the defendant that the complainant is entitled to no relief because of his delay in commencing this suit, which delay it is contended was from about the 1st of April, 1901, until the 16th of November, 1901, it is true that a party who seeks to avoid a contract upon the ground of undue influence must be prompt in seeking a remedy.

Equity requires vigilance in all parties demanding relief from actual fraud or constructive fraud, but the circumstances detailed in the evidence of the attempt of the complainant, and by a just inference of the defendant also, to settle the controversy or settle the differences between them, which extended practically during the whole of the time of said delay, takes this case out of the rule governing laches in the assertion of complainant's equitable rights.

The law looks with favor upon efforts to settle controversies, even going so far as to prohibit evidence as to what was said or done in pursuance of such efforts, and it would be strange if a party was trying to settle with his adversary, or two parties were trying to settle a controversy as in this case, that the one who might be adjudicated to have had the right of the controversy, should be defeated in such rights by reason of such commendable delay. Neither am I satisfied from the evidence that the complainant was then fully advised of his rights in the premises, or entirely free of the dominating influence and fear of defendant.

As to the other contention of the defendant that the complainant ratified the public agreement of August 4th by accepting interest or dividends paid upon his \$100,000 of stock in the association, the complainant never had delivered to him the \$100,000 of stock. It was not issued to him until, it is claimed, that he accepted the dividends upon the same. What is claimed to have been accepted as dividends upon

this stock arises out of the fact that the complainant, having been allowed to overdraw his account in the Bank of Zion, the defendant caused a credit to be entered upon the books of the bank in favor of the complainant, whereby his account was credited with two items, one being the so-called dividend on \$100,000 of stock, and the other being a certain amount which the defendant arbitrarily fixed as compensation for complainant's services as manager of said Industries, whereby this overdraft was wiped out, or substantially so; in other words, it is claimed that the defendant ratified the transaction by an act which was entirely the act of the defendant himself, with the suspicion attending it that it was done for the purpose of entrapping the complainant into such ratification. A ratification can only arise from the act of the mind, the intent of the party to ratify, knowing all of the facts and circumstances connected with the transaction. An intent to ratify a transaction cannot be held to arise by reason of a credit made to a deficient bank account under the circumstances stated. At the same time that notice that this credit had been passed to his bank account was sent to him, there was sent this \$100,000 of stock which he promptly returned to the secretary sending the same, refusing to accept of it. It is impossible to say that he intended to ratify the transaction, though refusing the stock, by simply not protesting against the credits in the bank account, when it is very doubtful whether he understood what they meant.

If the articles of agreement under which the Zion Lace Industries are carried on are to be held void, as against public policy, as I have held they should be, it is at least doubtful whether the complainant could, by any direct or indirect act of his own, by way of ratification or otherwise, make them legal and valid.

As to the defendant's contention that Stevenson had independent advice before entering into the public agreement, and is therefore not entitled to relief:

That a party took independent advice is not of itself a ban, but is only a circumstance (and may be one of great weight) to be taken into consideration. If it is competent

legal advice, it is of almost controlling weight, but if it is not legal advice, it is of little consequence. Stevenson took the advice of Deacons Barnard and Judd. They were witnesses in this case, and their evidence shows that Stevenson might just as well have taken more advice from John Alexander Dowie himself.

As to the \$50,000 of stock, a certificate for which was issued in the name of the wife of complainant, and received by complainant as executor and legatee under her will, and by him probated and inventoried as assets of her estate, no relief can be granted the complainant as an individual in this case, for the reason that it clearly appears that the complainant, on the night of August 8th took up an ante-nuptial note of \$50,000 and received therefor the sum of \$50,000 in checks of John Alexander Dowie upon the Zion City Bank, and gave that \$50,000 to his wife as he had promised by that note; it being practically all that the complainant had in the world except the \$100,000 of stock.

It may have been an act of folly on his part, but he does not, nor can he, under the evidence repudiate his ante-nuptial gift to his wife.

The bill does not charge, nor does the evidence show, that when she passed the checks over to the defendant Dowie, with the request that the money be invested in stock of this new association, she was acting under any undue influence of John Alexander Dowie, or that she ever repudiated the transaction.

The complainant cannot in his own right repudiate the transaction as to *her* by reason of any undue influence which the defendant Dowie may have exercised over *him*.

He can sue, as her executor, as to the transaction connected with the certificate for \$50,000 of stock.

He does not in this case sue as executor, and no rule is better established than that a party cannot have relief as an individual complainant, where his rights are those which appertain to him in his representative character as executor of a deceased person.

The complainant will have leave to become co-complainant

as executor, and the bill may be amended by making such allegations as executor as he may by his counsel consider to be necessary or proper.

In arriving at the conclusion that the transaction evidenced by the two agreements of date August 4th, 1900, must be set aside, and said agreements held of no binding force the court is not interfering with the constitutional right of parties to make contracts, but is only preserving that right in its purity, in applying to the case at bar the equitable principle that the transaction must be set aside and Dowie deprived of the benefit thereof, because the complainant did not act voluntarily, knowingly, intentionally and deliberately with full knowledge of the nature and effect of his acts, and because the consent to the transaction was obtained by the undue influence which Dowie exercised and was able to exercise by reason of the relations existing between Stevenson and himself.

Nor is any question of religion involved in this controversy. Dowie has the constitutional right to teach any religious doctrine that he thinks proper.

The only matter involved is the validity of a business transaction.

There is, however, a curious intermingling of religion and business in the transaction complained of.

"Religion" and "business" do not mix well together. The one is the service of God; the other is generally considered the service of Mammon. The history of all business enterprises, banks, manufactories, etc., which commingle business and religion, shows that they have ultimately resulted in disaster.

It is not necessary for the court to determine whether the defendant is carrying on the various enterprises, for his own financial benefit. There is some evidence to that effect, (and that he is not losing any money in so doing) but it falls short of being sufficient proof that he is merely seeking his own advantage.

Upon the contrary, the evidence strongly tends to prove that the defendant is a religious enthusiast, a religious zealot,

who honestly believes that he has a divine mission to convert sinners and build up "Cities of Zion" in every land, "to be inhabited by God's people who are to be governed by the immediate direction of the Almighty, speaking through His Prophets and others divinely authorized;" also, that he is carrying on these various industries, as he believes, for the glory of God and to effect such purposes.

If he is merely such a religious enthusiast, it makes his power over the members of his church so much the stronger than that of the ordinary clergyman, and the undue influence which the law presumes to exist from such relation, only so much the greater.

Having held the transaction of August 8th, 1900, not binding upon the complainant, and that the so-called public and private agreements of August 4th, 1900, must be set aside and held for naught for the reasons hereinbefore stated, what relief is the complainant entitled to upon the case as made by the pleadings and the proofs.

The prayer of the amended bill is, in substance, that the two contracts between Dowie and Stevenson of date August 4th, 1900, be declared null and void, and be delivered up and cancelled; that contract of date April 12th, 1900, be decreed to be still in force and to remain in full force and effect, and that defendant be required to perform the same to issue the stock of the corporation formed under said agreement; to transfer to complainant 1,000 shares of the par value of \$100 each; that defendant be required to pay complainant the said \$50,000, turned over by complainant to Mary Ann Stevenson, and such further sum, as on an accounting may be found due to complainant; also, that complainant may have such other and further or different relief as the court could grant if specially prayed for.

The court has held that the complainant is not entitled to any relief in his own right, as to the said \$50,000 turned over by complainant to his wife on the 8th of August, 1900.

That as between complainant and defendant the two contracts, dated August 4th, 1900, ought to be set aside and declared of no binding force or effect.

That as between Dowie and Stevenson, the contract dated April 12th, 1900, was valid, and remains in full force and effect; that the "Zion Lace Industries" incorporated in pursuance of the agreement of April 12th, was a fully organized corporation, with one million dollars of capital stock—all subscribed for—and capable of holding property and performing all the functions devolved upon it by law.

Also, that complainant is entitled to receive from Dowie a certificate of fully paid stock of said corporation to the amount of \$100,000.

The court has also found that said Dowie has not fully carried out said agreement of April 12th, 1900, but has failed so to do, and in equity should be required so to do, but the court finds itself unable to proceed to a full and final decree herein at this time for the want of necessary parties.

In the first place the legal corporation, the "Zion Lace Industries" is a necessary party to this litigation.

It is a legal entity, and acts by its officers in pursuance of the statute. It is true Dowie subscribed for all but four shares of the one million dollars of stock, but that was Dowie the individual, and he did not become thereby the corporation itself. He cannot act otherwise than as its president and a stockholder.

The duly elected board of directors can only order the issue of stock, and the court cannot order the board or the corporation to issue stock or do any other act, or make any decree in favor of the corporation as such, except the corporation and its board of directors are in court. They are not before the court, nor can the defendant Dowie be said to be here representing them.

The other four subscribers for one share of stock each, are necessary parties to any litigation like the present where, among other questions, the court would have decided whether or not there had been an abandonment of the corporation.

The Zion Lace Industries corporation, at the time the agreements of August 4th, 1900, were entered into, was and still is the equitable owner of all the property known as the

"Zion Lace Industries." Since Dowie took possession of the same and carried them on under the agreements of August 4th, 1900, large additions and values have been added thereto.

The question arises in this case: Shall these additions and values be held to be the property of the corporation, and if so, upon what terms? Not only is the corporation, its board of directors and all its stockholders, interested therein, and therefore necessary parties, but all the subscribers to and the holders of the common and of the preferred stock of the so-called association carried on by Dowie should be made parties.

It appeared on the hearing that preferred stock to the amount of \$431,200 had been sold under the August 4th agreement, and some common stock issued thereunder. Although it may be reasonably contended that Dowie under that agreement, must be held to represent the common and preferred shareholders, and that some of them took *pendente lite*, yet the court is not informed when they became severally such shareholders. As to those who became such between the time Stevenson repudiated the agreements of August 4th, 1900, and the commencement of this suit, there may be equities arising out of Stevenson's delay in making the matter *lis pendens* by commencing this litigation.

If there are any liens upon the Zion Lace Industries, arising since the 8th of August, when Dowie may be said to have taken possession under said so-called association agreement, or any persons have become since that date creditors in connection with said Zion Lace Industries, their rights and equities may have to be adjudicated.

The court does not hold that such creditors and lienors, if any there be, are necessary parties, but they have an interest which may entitle them to intervene.

It is not only the right of the court, but its duty, to require that all persons not parties to the suit, who appear to have any interest in the subject matter in litigation, be brought into court by the proper process, before making a

final decree in such suit, in order that there may be an end of litigation by adjudicating upon the rights of all parties interested in the subject matter.

It is also a maximum of equity that no persons shall be injured in its court by mispleading or want of form.

It appears to the court that when these necessary parties come in and issues are made up upon their answers, and evidence, if necessary, heard thereon, there may be found such complications as to the respective equities of the parties to the litigation and such difficulties in adjusting such equities that, in order to prevent undue loss to some of them, it may be necessary for the court to assess complainant's loss and damages (in lieu of all other relief) upon a basis that may be then warranted, but which basis the court cannot now determine.

The defendant will be ordered to, within twenty days, furnish complainant a list of all subscribers to (and so far as he knows, of all present holders of), the said common stock and of said preferred stock, issued under said public agreement of August 4th, 1900, showing the date when they became such subscribers, and so far as he can, such holders; and the amount so subscribed for and now held by such person or persons, respectively.

In view of the fact that the defendant is in possession of all the property and assets of said Zion Lace Industries, claiming the same under the said agreement of August 4th, 1900, which the court has decided should be set aside and held as nought, so far as complainant's rights are concerned, and as complainant is entitled upon the proofs before the court to have a receiver appointed to conserve said property and assets of said Lace Industries now in the possession of said defendant Dowie, and claimed by him under and by virtue of said agreement of August 4th, 1900:

THE COURT ORDERS, That Elmer Washburne be appointed receiver of all the property and assets known as the "Zion Lace Industries," now in possession of said defendant, John Alexander Dowie, and claimed to be held and owned by him under said public agreement of August 4th, 1900, with the

usual powers of receivers; to hold the same for the benefit of all parties interested therein, and subject to the order of this court. Said receiver to give bond with sureties, to be approved by the court, conditioned for the faithful performance of his duties, and the other usual conditions, in the penal sum of _____ dollars.

A decree in accordance with the views expressed herein will be prepared, but there must be an express reservation as to matters not adjudicated by such decree, and of the right of the court to make such other findings and decrees herein as the court may hereafter deem proper.

The complainant may, if he desires, make such amendments to his bill, as he may deem necessary to conform to the findings of the court.

(Circuit Court of Cook County.)

Anonymous.

(1872.)

Where a statute requires a notice to be published three weeks in a newspaper, it should be published in every issue of the paper during the three weeks; if a daily, once a day; if a weekly, once a week; and that a publication once a week in a daily paper is not a publication of three weeks, but only three days' publication.

FARWELL, J.:—

The statute says they should be published three weeks in a newspaper, and that ought to be, according to my view, every day during that three weeks on which the paper is published. If it is a weekly paper, once a week; if it is a daily paper, once a day. It ought to be published whenever the paper is published; but once a week in a daily paper, I do not think is good. I do not know whether there are any decisions on the question or not. I asked Judge Williams¹ about it, and he at once said he had no doubt about the question; that once a week publication in a daily paper is not a publication of three weeks, but is only three days.

¹ Judge Erastus S. Williams.—Ed.

(Circuit Court of Menard County.)

In the Matter of the Location of a Road in Menard County.

(March Term, 1872.)

1. CONSTITUTIONAL LAW—BENEFIT OF DOUBT SOLVED IN FAVOR OF LAW. Where it is not clear that a law is in conflict with the constitution the doubt should be solved in favor of the law.
2. ROADS—ESTABLISHING OF AS TAKING OF PROPERTY FOR PUBLIC USE. The establishment of a public road over the land of an individual, is a taking of private property for public use.
3. ROADS—ESTABLISHMENT OF—TAKING PROPERTY WITHOUT HAVING COMPENSATION DETERMINED BY JURY AS PROVIDED IN CONSTITUTION OF 1870. Although under the road law of 1845 as amended, private property can be taken for the purpose of establishing a road and the compensation determined by three householders appointed by the county court, these proceedings are not warranted under the constitution of 1870, which provides for the ascertainment of such damages by a jury.
4. SAME—REMEDY BY APPEAL. Nor is it material that the land owner has a remedy by appeal from the county court to the circuit court, where a jury trial could be had.

Proceeding under the road law of 1845 for the location of a road on a petition presented to the county commissioners. Heard in the circuit court before Judge Turner on appeal. The facts are stated in the opinion.

S. S. Knoles, of the Petersburg bar, for certain parties.

TURNER, J.:—

This was a proceeding under the road law, R. S. of 1845 and amendment of 1855, to locate a road, on a petition presented to the county commissioners, and proceedings were had and an order made pursuant to that law, locating the road and fixing the damages as assessed by the three householders appointed by the county court, and appeal taken to the circuit court, where the appellant moves to dismiss the proceedings, for the reason that they are unwarranted by the law under the constitution of 1870. The constitution provides, art. 2, sec. 13, "Private property shall not be taken

or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury as shall be prescribed by law."

The constitution being the supreme law of the state, the question presented is, whether this law, which was in force previous to its adoption, is not clearly in conflict with the express provisions of the constitution above quoted, for it is a well recognized principle in deciding upon the constitutionality of a law, that where the act of the legislature is not clearly in conflict with the constitution, the benefit of any doubt should be in favor of sustaining the law. Establishing a public road over the land of an individual, is a taking of private property for public use. If the owner does not consent to such taking, and does not release any claim that he has for compensation, then it must be ascertained by a jury to meet the requirements of the constitution. Does the law in question provide any mode by which such compensation can thus be ascertained?

It appears to me clearly that it does not.

It is insisted on the argument, that after all the requirements of the law have been complied with in the county commissioners' court, an appeal may be taken to the circuit court, where the demands of the constitution can be met by the intervention of a jury. It is also conceded that there is no other tribunal provided for in the law, where this requirement can be complied with, as the county commissioners' court is not a judicial body before which a jury could be called for that purpose.

The constitution being clear and explicit upon that point, it is very evident that without the intervention of a jury, the proceedings would not be such a compliance with its requirements as to justify the taking of the land for the public highway.

The law in question, makes the proceedings for the establishment of a road, complete, where the report of the viewers and commissioners appointed to assess damages, are approved and recorded in the county commissioners' court, un-

less an appeal be taken to the circuit court; yet it cannot be contended, that if the proceedings were to stop in the county commissioners' court, the road would be a legal highway, or that the owner of the land would be divested of the same. It must be admitted then, that when all the requirements of that law have been complied with, the demands of the constitution have not been satisfied, nor is it easy to conceive how they could be satisfied by following any of the provisions of that law.

The provision of the law for the assessment of damages or ascertaining compensation, by the appointment of three householders, is, under the constitution, a nullity; hence it is difficult to conceive how anything in the form of legal proceedings, which in themselves have no validity, should be considered a necessary part of the proceedings, to render any final result legal. If such a principle could be admitted, how could the final result be obtained in the circuit court? Suppose no one proposes to take an appeal from the county commissioners' court, the county cannot do it, and then the proceedings must necessarily fail for want of the intervention of a jury under the direction of a judicial tribunal.

The case of *Rich v. Chicago*¹ is referred to as authority to sustain the law under the constitution, but as I understand the decision of the supreme court in that case, it does not meet the difficulty presented in this. In view of the public necessities, it would be desirable to sustain the validity of the law, but it cannot be done in violation of well settled principles, and the legislature alone can afford relief.

The proceedings must be dismissed.

¹ 59 Ill. 236.—Ed.

(*Supreme Court of Illinois.*)

George W. Acres

vs.

David George.

(January 22, 1872.)

PARTITION FENCES—DUTY TO REPAIR—LIABILITY FOR CATTLE BREAKING THROUGH. Where the plaintiff's cattle were in defendant's field with the consent of the latter and they passed upon the defendant's premises through a breach in the partition fence made by the cattle of defendant, the defendant has no right to take up and hold plaintiff's cattle, than if such breach had been made by himself.

Appeal from Lee county.

Eustace, Barge & Dixon, for appellant.

Jas. K. Edsall, for appellee.

PER CURIAM

There was error in sustaining the demurrer to the amended additional replication.

It shows that plaintiff's cattle were in defendant's field with the consent of the latter, and they passed thence upon the premises of the defendant through a breach in the partition fence, made by the cattle of the defendant. The breach thus made it was his duty to repair. Under such circumstances the defendant had no more right to take up and hold plaintiff's cattle, under the act of 1867, entitled "Domestic animals," than he would have had if the breach in the fence had been made by the defendant himself instead of his cattle.

Reversed and remanded.

(*Supreme Court of Illinois.*)

Anna Burton

vs.

Martin Green.

(September 28, 1871.)

1. **EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.** Where a complainant alleges that at the time of filing the bill, and prior thereto, the full title in fee simple to the tract of land described in the bill was vested in him, and prays for a conveyance of the land by the defendant to him, a court of equity has no jurisdiction of the subject matter, and can grant him no relief, as he has an adequate remedy at law.
2. **ALLEGATIONS OF BILL—POSSESSION—REMEDY AT LAW.** In such case, where there is no allegation in the bill that the complainant was in possession of the land, of which he seeks to compel a conveyance, at the time of filing his bill, the inference must be that he was not in possession; and not being in possession, his remedy to recover the possession was complete at law, by an action of ejectment.
3. **LOST DEED—SUBSEQUENT CONVEYANCE—EQUITY JURISDICTION.** The fact that a widow receives a deed of premises to herself to supply the place of a prior deed executed to her husband in his lifetime, and alleged to be lost, constitutes no such equity as to give chancery jurisdiction to compel the widow to convey to the complainant.

Charles J. Beattie, for plaintiff in error.

Dickey, Rice & Lewis, for defendant.

BREESE, J.:—

Complainant alleges in his bill, that at the time of filing the same and prior thereto, the full title in fee simple to the piece of land described therein, was vested in him. There is no allegation in the bill that complainant was in possession, the inference, therefore, must be he was not in possession, and being so, his remedy to recover the possession was complete at law by an action of ejectment, in which he could not fail to recover, on showing a complete legal title in himself. The fact that Mrs. Burton had received of Hallam a

deed to herself, to supply the place of a prior deed executed to her husband in his lifetime, and alleged to be lost, constitutes no such equity as to give chancery jurisdiction. Complainant claims through Burton, and to establish his title at law, it would only be necessary to prove the execution of the deed by Hallam to Burton and its subsequent loss. We fail to perceive any equity in complainant's bill. The motion to dissolve the injunction and dismiss the bill should have been allowed. Refusing it was error, and for this the decree must be reversed and the cause remanded.

(Municipal Court of Chicago.)

Laura L. Arthur

vs.

John J. Doyle, Peter Doyle and William Griffin.

(1907.)

1. **FORCIBLE ENTRY AND DETAINER—SUIT ON BOND—DAMAGES FOR TIME PREMISES UNLAWFULLY WITHHELD—RENTAL VALUE—VALUE OF USE AND OCCUPATION.** It is competent in a suit on a bond given by a defendant in an appeal in a forcible entry and detainer proceeding, to show the value of the use and occupation of the premises for the time the defendant unlawfully withheld them. "Rental value" and the "value of the use and occupation" are synonymous.
2. **TRIAL—EVIDENCE ELICITED ON CROSS-EXAMINATION—ESTOPPEL TO COMPLAIN.** A party is not in a position to complain of facts brought out on cross-examination of his opponent's witness.
3. **FORMER ADJUDICATION—SPLITTING CAUSES OF ACTION—SUITS FOR DAMAGES FOR UNLAWFUL DETENTION OF PREMISES—WHEN RECOVERY IN ONE SUIT ONLY ALLOWABLE.** Where a plaintiff institutes two suits for damages which have accrued to him by the unlawful detention of his premises by the defendant and in one of them seeks to recover for part of the time they have been detained, and in the other for the remainder of the time, a recovery in one will preclude a recovery in the other. The law does not allow a splitting of the cause of action in such a manner.

Motion for new trial.

The facts are stated in the opinion of the court. Heard before Judge Freeman K. Blake.

Steele & Thompson, attorneys for plaintiff.

Gearon & Gearon, attorneys for defendants; *Aaron Helms*, of counsel.

BLAKE, J.:—

Counsel for defendants urge two points as ground for a new trial, viz: first, that the court erred in the admission of evidence on the part of the plaintiff, and, second, that the court erred in the exclusion of material evidence tendered by the defendants.

Upon the first point it is insisted that it was error to admit evidence of the value of the use and occupation of the premises during the time they were withheld by the defendants. It is particularly urged that the court erred in permitting a witness for plaintiff to testify that the rental value of the box-stalls was \$5 per month, and of the single stalls \$2.50 per month. Our courts have held that it is competent to prove the rental value of the premises and the value of the use and occupation, and that the terms "rental value" and "the value of the use and occupation" are synonymous. *Dulaney v. Payne*, 101 Ill. 325; *McDole v. McDole*, 106 Ill. 452. It is true that on cross-examination, counsel elicited from this witness that these amounts were the amounts which could be realized for such stalls by renting them to customers in the business of conducting a livery and boarding stable on the premises. The defendants are not in a position to complain of facts brought out by them on cross-examination of plaintiff's witness.

The next question raised is whether the court erred in excluding from the jury the record of the former case which was offered by defendants as a bar to the cause of action before the court in this case. It appears from the excluded evidence thus offered that on February 7, 1907, Laura L. Arthur, the plaintiff in this cause, commenced an action in this court against John J. Doyle and Peter Doyle, two of the

defendants in this action, to recover damages on a certain penal bond executed on November 22, 1905, by said John J. Doyle in an appeal from a judgment in a forcible detainer case wherein said Laura L. Arthur was plaintiff and said John J. Doyle was defendant, which case was brought for the restitution of the same real estate in question in the case at bar, to wit, the first and second floors of the brick building known as No. 240 S. St. Louis avenue, and the flat on the second floor of said premises, and which bond was conditioned "that said John J. Doyle should prosecute his appeal with effect and pay all rent then due, or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy, and by reason of any injury done thereto during such withholding until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue in case the judgment from which the appeal is taken is affirmed or appeal dismissed."

The plaintiff's bill of particulars in the former case avers that her claim is based upon an appeal bond signed and sealed by the defendants and filed in the circuit court of Cook county, in an appeal from a judgment entered in favor of Laura L. Arthur by John K. Prindiville, justice of the peace, in an action of forcible entry and detainer in which Laura L. Arthur was plaintiff and John J. Doyle was defendant, and the items of damages alleged and set out were three and one-quarter months' rent at \$140 per month, \$455; damages to premises, \$200; interest on rent to date, \$22.67; court costs (circuit court) \$8.50, and attorney's fees, \$50, making a total of \$736.37. Upon all the allegations of the bill of particulars issue was joined and the cause was tried to a jury and a verdict returned in favor of plaintiff upon which, after hearing and overruling a motion for a new trial, the court rendered judgment on April 20, 1907, for \$289.52 damages and costs which defendant paid and the judgment was thereupon satisfied by the plaintiff.

On the 7th day of February, 1907, the plaintiff Laura L.

Arthur commenced the case at bar against the defendants John J. Doyle, Peter Doyle and William H. Griffin. In her declaration the plaintiff avers in apt terms that in the same cause above referred to there was pending on January 8, 1906, in the circuit court of Cook county, Illinois, upon appeal of said John J. Doyle, from a judgment rendered by John K. Prindiville, a justice of the peace in and for Cook county, Illinois, a certain action in forcible detainer wherein said Laura L. Arthur was plaintiff, and said John J. Doyle was defendant, and that such proceedings were had in said court; that on January 8, 1906, a judgment in forcible detainer was rendered by said court against said John J. Doyle in favor of said Laura L. Arthur; that said Laura L. Arthur do have and recover possession of the premises described as the first and second floors of the building known as number 240 South St. Louis avenue, in the city of Chicago, Cook county, Illinois, from which said judgment said John J. Doyle prayed an appeal to the appellate court of Illinois for the First district, which was allowed upon his filing an appeal bond in the sum of fifteen hundred dollars (\$1,500) and that on the 9th of February, 1906, said John J. Doyle as principal and Peter Doyle and William H. Griffin as sureties, executed their certain appeal bond in that behalf in the penal sum of fifteen hundred dollars (\$1,500), which was approved and filed in the office of the clerk of said circuit court in which bond a certain condition was written as follows, to-wit: "The condition of the above obligation is such That Whereas, the said Laura L. Arthur did, on the 8th day of January, A. D. 1906, in the circuit court of Cook county, state of Illinois, and of the December term thereof, A. D. 1905, recover a judgment against the above bounden John J. Doyle for the restitution of certain premises described in the plaint, to wit, the first and second floors of the brick building known as No. 240 South St. Louis avenue, and the flat on the second floor of said premises, and costs of suit, from which said judgment of the said circuit court of Cook county, the said John J. Doyle has prayed for and obtained an appeal to the appellate court within and for the

First district of Illinois. Now, therefore, if the said John J. Doyle shall prosecute such appeal with effect and pay all rent then due, or that may become due before the final determination of the suit, and also all damages and loss which the plaintiff may sustain by reason of the withholding of the premises in controversy and by reason of any injury done thereto during such withholding, until the restitution of the possession thereof to the plaintiff, together with all costs that may accrue in case the judgment from which the appeal is taken is affirmed, or appeal dismissed, then the above obligation to be void, otherwise to remain in full force and effect."

It is averred that in said cause the appellate court affirmed the judgment of the court below, that the defendant Doyle unlawfully withheld the possession of the premises from October 31, 1905, until the 30th day of September, 1906, and that the value of the use and occupation thereof during said period was \$1,350, and that plaintiff sustained other damages to the amount of \$150.

The defendants pleaded the former judgment and payment and satisfaction of the same in bar. Demurrers were filed by defendants and sustained by the court and exceptions reserved by defendants. The cause was tried in its order and verdict returned by the jury for \$1,200, and a motion for a new trial was made by defendants which is now before the court for decision. Upon the trial, defendants offered the record in the former case in evidence but the same was excluded by the court and exception taken by defendants. This presents the second question for our decision.

At the time the first suit was commenced the entire claim of the plaintiff had fully accrued.

In this last point raised by the defendants we have presented the question of former adjudication upon which we shall express our views at some length. It is contended by defendants that the question of plaintiff's damages by reason of the unlawful withholding was in issue in the former suit, and that the jury assessed the amount of such damages,

that judgment therefor was rendered and paid and that thereby plaintiff's entire claim was satisfied.

In the case of *Wright v. Griffey*, 147 Ill. 496, the court says: "Where some controlling fact or question material to the determination of both causes has been adjudicated in the former suit by a court of competent jurisdiction, and the same fact or question is again at issue between the same parties, its adjudication in the first suit will, if properly presented, be conclusive of the same question in the latter suit, whether the cause of action is the same in both suits or not. The latter is in some of the cases designated as estoppel by verdict."

The doctrine thus laid down is undoubtedly the law of this state and is in accordance with the current of decided law elsewhere.

In *Boddie v. Brewer & Hoffmann Brewing Company*, 107 Ill. App. 357, the court (quoting from *Henderson v. Henderson*, 3 Hare, 115) said: "Where a given matter becomes the subject-matter in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted a part of their defense. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising a reasonable diligence, might have brought forward in time."

Bigelow on Estoppel, 57, lays down the rule that a point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court at law, or in chancery, or in admiralty, when either party, or the privies of either party, allege anything

inconsistent with it; and this too, whether the subsequent suit is upon the same or a different cause of action. To the same effect are also *Hanna v. Read*, 102 Ill. 596, and *Reynolds v. Mandel*, 175 Ill. 615.

Upon these authorities there can be no doubt that if the damages claimed in the two actions above described are one and the same claim, the first suit and the result obtained therein would prevent a recovery in this case. The claim of the plaintiff is for damages which accrued to plaintiff by reason of the unlawful withholding of the premises in question for a period of about eleven months. In the first suit plaintiff claimed for three and one-quarter months of that time and in this suit claims for seven and three-quarters months, or the remainder of the whole time. Was plaintiff's claim of such a character that she could bring more than one suit, or was she compelled to submit her whole claim in one action? The statutes of a tenant holding over against the landlord's will has been adjudicated by our courts. In the case of *Keegan v. Kinnare*, 123 Ill. 280, which was an action on appeal bond given in a forcible detainer case, the court said:

"Counsel for appellee were permitted, over the objection of counsel for appellants, to prove the rental value of the property from May 1, 1883, to January 5, 1885—the date of Kinnare's death. The evidence shows that appellants went into possession under a written lease of the property described in the bond from the 1st day of October, A. D. 1878, until the 1st day of May, A. D. 1880, at a stipulated rent of \$15 per month; and the contention of counsel for appellants is, that appellants are liable for rent only at that rate. But notice was given terminating that tenancy on the 1st day of May, 1883, which was held sufficient in the suit in which the bond was given. Instead of being tenants after the first day of May, A. D. 1883, appellants were expressly adjudged to be trespassers; and the case cited by counsel for appellants (*Clin-ton Wire Cloth Co. v. Gardner et al.*, 99 Ill. 151), only holds that where a tenant for a year or years, holds over after the expiration of his lease, without having made any new arrangement with his landlord, under which such holding over

takes place, the landlord, at his election, may treat the tenant as trespasser, or as a tenant for another year upon the same terms as in the original lease. But this right of election does not belong to the tenant—it is the landlord alone who may thus elect. (Wood on Landlord and Tenant, page 22, and authorities cited in note 4.) Here the landlord has elected to treat the tenants as trespassers, and they must, consequently, be liable to the administratrix of the landlord for the value of the premises for the length of time they have withheld them from him—namely, from the 1st day of May, A. D. 1883, until the date of his death January 3rd, A. D. 1885. 2 Waterman on Trespass, section 96.”

In the case of *Johannes v. Kielgast*, 27 Ill. App. 576, the court states the facts of the case as follows: “The rent which appellant covenanted to pay was \$35 per month, and he did pay the same to the month of August, 1878. Having made default in payment of the rent for that month, appellee about the 15th day of September, 1878, served upon him a written notice of termination of the lease in five days, if the rent was not paid within that time. The rent remaining unpaid, the appellee, at the end of the five days, commenced suit in forcible detainer against appellant which resulted in a judgment for possession in favor of appellee in February, 1879, the appellant having occupied until that date. This action of covenant was commenced March 5, 1886, and judgment was rendered by the court below for the months of August, September, October, November and December, 1878, and January, 1879, which appellant now seeks to reverse on the ground that an action on his covenant cannot be maintained for any rent accruing after the termination of the lease. The right of enjoyment is the correlative of the duty to pay rent. Whenever the right of enjoyment is lawfully terminated so that it cannot be restored except by mutual consent, the covenant as to payment ceases to be an obligation as to any installment, which, by the terms of the lease, would thereafter have become due.”

The plaintiff, therefore, could not recover rent under the covenants in her lease. She could only recover from the de-

fendant damages accruing as against a tortfeasor and her claim consisted of a single item for the rental value of the premises during the whole time from September 30, 1905, to October 1, 1906, and such other damages as she may have proved. The nature of such a claim does not permit of a separation into parts comprising monthly periods, or into other periods arbitrarily fixed by either of the parties. Without quoting from the cases sustaining the proposition that plaintiff cannot split his claim and bring several suits thereon, and if he undertakes to do so, the judgment in the first suit will bar any subsequent suit, especially where the judgment has been paid and satisfied, the following cases are cited: *Casselberry v. Forquer*, 27 Ill. 170; *Camp v. Morgan*, 21 Ill. 255; *Nickerson v. Rockwell*, 90 Ill. 460; *Mathias v. Cook*, 31 Ill. 83; *Lucas v. LaCompte*, 42 Ill. 303; *Thompson v. Sutton*, 57 Ill. 213; *King v. Arney*, 114 Ill. App. 141.

From the points above presented and the authorities cited in support thereof, it will appear that plaintiff's cause of action set up in this case is barred by the judgment and satisfaction thereof in the former case. It follows that the court erred in the exclusion of the record from the evidence, and in sustaining the demurrer to the plea setting up said judgment. The motion for a new trial is sustained and a new trial is granted.

(Circuit Court of Cook County.)

Abel C. Bingham

vs.

Ann Jackson.

(July 16, 1872.)

- 1. PARENT AND CHILD—DUTY OF PARENT TO SUPPORT INFANT CHILD.**
A parent is under obligation to provide for the support of an infant child. It is a principle of natural law resting upon the foundation of parental affection and moral duty, and of the common law based upon the right of the parent to the services of the minor.

2. **SAME—LIABILITY OF PARENT FOR NECESSARIES FURNISHED CHILD.**
A parent can only be held liable to third persons for necessities furnished a minor child where a contract, either express or implied, can be shown. Very slight circumstances will, however, establish such a contract.
3. **SAME—LIABILITY FOR CONTRACTS OF INFANT.** Where an infant can make no contracts and must be supplied or suffer, the reason for requiring a contract ceases and the parent is liable for all supplies to an infant which were so absolutely needed that the infant must have them or perish.
4. **SAME—LIABILITY OF MOTHER.** The same liability rests upon the mother after the death of the father.

Action for value of services rendered by plaintiff to defendant's minor son. Heard before Judge John G. Rogers. The facts are stated in the opinion.

J. C. & J. J. Knickerbocker, for plaintiff.

Bunyan, Avery, Loomis & Comstock, for defendant.

ROGERS, J.:—

B. F. Jackson, a minor and son of the defendant, Mrs. Ann Jackson, was run over by a train of cars and so injured that both of his legs had to be amputated. At the time of the accident he lived with his mother, but was engaged in work for a railroad company. When injured he was taken into a hotel and the plaintiff, Dr. Bingham, was called in as a physician and surgeon. It was necessary to amputate his limbs to save his life. The doctor had to attend him for several weeks afterwards. The boy sued the railroad company, recovered a large judgment, which was set aside and reversed by the supreme court, and before another trial was had, the suit was compromised, and he received \$3,000 in full of all claim for damages. He did not pay the plaintiff for his services, and this suit was then brought against his mother to recover for the services of the plaintiff. Upon the trial by the court, without a jury, the facts aforesaid appeared, and it was also found that the boy's father had been dead for some years before the accident; that his mother, the defendant, had an estate worth at least \$6,000, and that the greater part of the money received by her son from the rail-

road company had been used in paying off debts due by his mother on her homestead in this city.

It was not shown that the doctor was called to see and attend B. F. Jackson by his mother, but it did appear that she knew of his services after he was first called in. Nor did it appear clearly whether the money received by the son for his services to the railroad company was paid to him or to his mother. There was no controversy on the trial as to the services rendered by the plaintiff, nor of the value thereof. The only question made was as to the liability of the mother. The general principle that a parent is under an obligation to provide for the support and maintenance of his infant child is too well established to admit of doubt. It is a principle of natural law, resting upon the foundation of parental affection and moral duty. It, too, is a principle of the common law, based upon the right of the parent to the services of his minor child, so that there is both moral and legal obligation upon the father to supply his child while yet a minor with the ordinary necessities of life.

In England at an early day it was provided by statute that "the father and mother, grandfather and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability, according as the quarter session shall direct." Sharswood's Blackstone, book 1, vol. 1, page 447.

This statute, it will be observed, did not confine the obligation to support only such children and grand-children as were minors; it included all, old or young, who were poor and impotent, and who were from the loins of parents. Without this statute the obligation to maintain minors, in England, was recognized as a legal one, but the courts held that the parent could only be held liable to third persons for necessities furnished a minor child where a contract could be shown, either express or implied, from particular facts. But very slight circumstances sufficed to justify them in finding a contract on the part of the parent. And "it will be noticed that where it is most distinctly denied that this moral obligation of the parent constitutes a legal obligation,

the denial is confined to a liability for the contracts of the child." See Parsons on Contracts, fifth edition, vol. 1, page 303.

But "where the infant can make no contract, and must be supplied or suffer," then the reason for requiring a contract, which arises from the danger of permitting a father to be bound, ceases. See Parsons, *supra*.

The rule of law in this country generally, if not universally, "imposes a liability on the father for all supplies to an infant which were so absolutely needed that he must have them or perish." Parsons, page 306. The case we are considering falls under this rule, for without the services of a physician and surgeon young Jackson would have suffered greatly, and, no doubt, died.

That his father, if living, would have been liable for the services rendered his son, I have no doubt; but whether the mother is under equal obligation, the father being dead, is the question here. It is said by Parsons that the legal obligation upon the mother is very greatly qualified in important particulars, one of which is, where the son has property in his own right. To the same effect is *Whipple v. Dow*, 2 Mass. 415. But the obligation, if any, in the case we are considering, arose where the son had no property, and it is in that respect different from the cases cited and relied upon by defendant's attorneys. Besides, I can see no difference whatever in the moral or legal obligation resting upon father and mother. The mother has as strong, if not stronger, natural affection for her offspring. She is entitled to the services of her minor child; the father being dead, is then the head of the family, and should assume all the parental burdens. See Schouler's Domestic Relations, page 325. See, also, as to her right to the son's services, *Dufield v. Cross*, 12 Ill. 397.

In view of the facts of this case, that B. F. Jackson, a minor child of the defendant, his father being dead, had no property at the time of the accident and the rendering of the services sued for, was living with his mother, who was entitled to his services, and would have suffered and died but for the services and attention of the plaintiff, and that she

had and now has a good estate, freed from incumbrance by money furnished her by that son, which he afterwards acquired, I have no doubt of her moral and legal obligation to pay for the services sued for.

Let judgment be entered for the plaintiff against defendant for \$273.25.

(Circuit Court of Cook County.)

Jacob Meyer

vs.

Aurora Insurance Co.

(July 5, 1872.)

1. **BANKRUPTCY—STAY OF PROCEEDINGS.** A stay of proceedings of a suit at law on the ground of the pendency of bankruptcy proceedings should be denied where the bankrupt cannot receive a discharge.

Motion to stay further proceedings in action at law on account of the pendency of bankruptcy proceedings. Heard before Judge Lambert Tree.

TREE, J.:—

This is a motion to stay further proceedings in this court on the ground that the defendant, the Aurora Fire Ins. Co., is in bankruptcy. The motion is based on the 21st section of the act of congress, known as the bankrupt law, which provides that any "suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge; provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain discharge." A discharge under the act may be pleaded in bar to any further maintenance of an action for prior indebtedness; but the 37th section of the same act provides, "that no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof."

It will be seen that the bankrupt law establishes a distinction between corporations and individuals in this respect; but inasmuch as an individual may procure a final discharge, there is evident propriety in staying proceedings until it can be ascertained whether the court in bankruptcy shall grant him one. But even in that case, the law provides that there shall be no unreasonable delay in prosecuting the proceedings in bankruptcy to a final determination. In the case of a corporation, however, which can never receive such a discharge by the terms of the act itself, it is difficult to see upon what grounds the creditor should be required to stay his suit, and especially where judgment may be necessary to perfect a legal remedy against officers or stockholders of the company. This doctrine was held by Brady, Justice (N. Y. Supreme Court), who refused to stay proceedings, in the case of *Sarah O. Allen, administratrix, v. The Soldiers' Business Messenger and Dispatch Company*, 4 Bankruptcy Register, 176; and it seems to me that the doctrine is sound on principle and sustained by the language and spirit of the bankrupt act. The motion to stay the proceedings in this case is therefore denied.

(Superior Court of Cook County. In Chancery.)

A. Montgomery Ward

VS.

Field Museum of Natural History, a corporation, and South Park Commissioners, a municipal corporation.

1. **EQUITY—DEMURRER TO CROSS BILL—EXAMINATION OF OTHER PLEADINGS.** Upon a demurrer to a cross-bill, it is competent to refer to the answer filed with the cross-bill, where the cross-bill refers to the answer to determine what are the allegations made by the defendant upon which he bases his relief.
2. **EQUITY—DEMURRER TO CROSS-BILL TO REMOVE CLOUD ON TITLE CONSISTING OF EASEMENT SET UP IN BILL.** A demurrer to a cross-bill will be overruled which seeks to remove a cloud on

title consisting of an easement in cross-complainant's land which complainant by his bill seeks to establish, as on demurrer to a cross-bill the facts therein stated must be taken as true.

3. **COURTS—JUDICIAL DECISIONS—AS TO WHAT IS, THE DECREE OR THE OPINION OF THE COURT.** If a point presented for decision to the supreme court is left open and undecided in and by its decree, then that point is left open notwithstanding the supreme court in its opinion made use of language which if given literal interpretation would foreclose the question.
4. **PUBLIC PARKS—WHAT ARE.** The primary idea of a park is an ornamental and adorned tract of ground to serve as a place of free public resort.
5. **PARKS AND COMMONS—DEDICATION OF LAND FOR—INCONSISTENCY.** Land cannot be dedicated and accepted as a park and at the same time be "a common to remain forever open, clear and free of any buildings or other obstructions whatever." A park and an unoccupied common are two different and inconsistent things.
6. **INJUNCTIONS—EASEMENTS—ISSUANCE OF IN DOUBTFUL CASE—BALANCING OF CONVENIENCES.** When the easement which complainant seeks to enforce is of doubtful validity and its enforcement will entail great loss to the defendant and hardship to the public and its non-enforcement will create no irreparable injury or the injury is slight to the complainant the latter should be denied the injunction and left to his remedy at law.
7. **COURTS—JURISDICTION OF SUPERIOR COURT TO PROHIBIT ENFORCEMENT OF DECREES ENTERED PREVIOUSLY IN SUPERIOR OR CIRCUIT COURT.** The superior court has no jurisdiction to prohibit a complainant from moving in any way he may be advised to enforce decrees which may have been previously entered in the circuit and superior courts.
8. **EQUITY—JURISDICTION TO DETERMINE VALIDITY OF A LAW AS TO RIGHT OF PARTY TO CONDEMN—HOW VALIDITY TO BE DETERMINED.** A court of equity has no jurisdiction in the present equity proceeding to determine the validity of a law in respect to the right of one of the parties to condemn the rights of the others. The scope, effect and validity of the law will be directly involved in any condemnation proceeding that may be instituted and all matters in relation thereto must be determined by the court in the progress of such litigation if any shall be instituted.

Demurrer to cross-bill. Heard before Judge George Dupuy. Gen. No. 259,201. The facts are stated in the opinion.

DUPUY, J.:—

The matter to be here determined is a demurrer, general and special, to the cross-bill of complainant. I was somewhat in doubt whether, in undertaking to determine the matter, I should be confined solely and entirely to the allegations of the cross-bill, or whether it would be permissible to examine the other pleadings so often referred to during the course of the argument. The rule in such case is set forth in the opinion of the supreme court in the case of *Thielman v. Carr*, 75 Ill. 385, 389, where it is said:

“After a defendant has fully answered the bill, no objection is perceived to his then stating new matter entitling him to such relief, as he would in the cross-bill, and ending with an appropriate prayer for relief. We can see no particular merit to be imparted to such pleadings by having them detached and on separate papers. We can see no particular objection even in form to such a course.”

I understand from this authority that, upon demurrer to a cross-bill, it is competent to refer to the answer filed with the cross-bill, where the cross-bill refers to the answer, to determine what are the allegations made by the defendant, upon which he bases his claim for relief.

The special points of demurrer, as set forth at considerable length in paragraphs 1 to 12 of the pleading filed, may be roughly stated as follows:

I. That the cross-bill seeks no relief that the court could not award under the original bill and answer, and hence is unnecessary (paragraphs 1 to 6 inclusive).

II. That the same matters here in dispute were judicially determined by the decree entered in the case of *Ward v. City*, *infra* (paragraphs 7 and 9).

III. That the same matters here in controversy were again judicially determined and finally adjudicated in the case of *Ward v. Bliss*, 198 Ill. 104 (paragraphs 8 and 9).

IV. That the court in this proceeding has no jurisdiction to enjoin cross-complainants from proceeding to have cross-defendants punished as for contempt for violation of the aforesaid former decrees (paragraph 10).

V. That this court has no jurisdiction to determine the effect or validity of the act of March 14th, 1903, in respect to the right of condemnation under the power of eminent domain purported to be thereby conferred upon the cross complainant (paragraph 11).

VI. That said cross-bill is not germane to the subject matter of the original bill.

VII. In the general demurrer it is of course alleged the cross-bill shows no title to any relief.

* * * * *

POINT I of the special demurrer must be overruled, and for this reason: The bill asserts the existence, in favor of the complainant, of a certain easement in the real estate in question. The cross-bill denies the existence of such easement, and further charges that such assertion of the complainant is a hindrance to its beneficial enjoyment of the land so held in trust, and that such assertion by the complainant is in effect at least a cloud upon its title.

If this easement claimed by the complainant is shown to exist, then of course the cross-complainant can have no relief. If it does not exist, then it must be equally clear that its assertion by the complainant is a hindrance to the enjoyment of cross-complainant's title.

Taking the charges contained in the cross-bill as true, as must be done for the purposes of this demurrer, I am of the opinion that this point of objection is not well founded.

I am of the opinion that Points II and III of demurrer are not well taken. These are the ones that were most strenuously insisted upon in argument and that present the greatest degree of difficulty. They present directly the question whether or not

(1) The matters here in controversy have been judicially disposed of and determined by the decrees in the two cases of *Ward v. City* and *Ward v. Bliss*, already referred to, and also

(2) Whether aside from the decrees in those cases, the cross-complainant shows any title to relief.

Upon the argument of these demurrers, the court's atten-

tion was called to the language of the supreme court in the case of *Ward v. City*, 169 Ill. 392, 403, where it is said:

"That the land was so dedicated and accepted subject to the restrictions imposed, of being forever unoccupied by buildings, and that this restriction extended to and included all the land between the west line of Michigan avenue and the shore of the lake as it was when these lands were platted, we entertain no doubt."

The attention of the court was also directed to other similar expressions of the court in the two cases referred to, and to the holding of that court that all of the present park area is under the same restrictions as to buildings.

It was strenuously insisted upon the argument of these demurrers, that the language of the supreme court before referred to, settled the matters here involved, beyond all reasonable dispute, and that it would amount to "judicial anarchy" on the part of this court should it deny to the language of that court literal application to the matters in controversy here. And here it may be remarked, that this court has not the slightest disposition to suppose the supreme court did not understand the decision it rendered, and still less has this court any inclination to overrule or refuse to apply the law of the decisions above referred to.

It was further claimed by demurrant's counsel that if there were any conflict between the terms of the *decrees* in the two cases referred to and the language of the supreme court in considering the cases, that the language of the *opinion* and not the language of the *decree* should govern this court in the matter now being considered.

That contention is not in accord with the law. On this point Mr. Chief Justice Schofield, in the case of *Mayer v. Erhardt*, 88 Ill. 452, at page 457, said:

"And here we may appropriately quote from the opinion of Judge Marshall, in *Cohens v. Virginia*, 6 Wheaton, 399: 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to con-

trol the judgment in a subsequent point when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' "

So here, "if the very point presented for decision" was not decided in and by the *decree* of the court in either of the former cases, then it is clear that the language of the supreme court, if any, not applicable to the points determined by the *decree*, "ought not to control;" and, further applying the above doctrine to the matter here presented, if that *decree* does not prohibit structures consistent with the use of this ground for a park, and if there are buildings that are *necessary* to a park, then the decree in the case referred to left the question here presented open and undetermined, notwithstanding the supreme court in its opinion made use of language which, if given literal application, would prohibit all buildings of every character.

That decree determined that both the city and other persons must

"Absolutely desist and refrain from placing or causing to be placed any building, material, lumber, timbers, dirt, rubbish, garbage, debris, street sweepings, or other material whatsoever, of any kind or nature, except * * * such structures * * * to be placed thereon for the purpose of making a public park of said premises."

But it is clear that that decree, by its own terms, did not prohibit the use of said real estate for park purposes. The language is:

"And said defendants are further hereby commanded to absolutely desist and refrain from using or occupying or permitting the use and occupation of the above described premises, for any purpose * * * not consistent with the use of said public ground, within the limits above mentioned, for a public park, solely and exclusively."

I am of the opinion that the respective rights of the parties

hereto, in or in any wise connected with said plat of ground, grow out of the original dedication and acceptance of the same, not limited or affected by any subsequent legislation. Whatever rights the abutting owners then acquired, became and are vested rights of which they cannot be deprived by any power on earth except by the exercise of the sovereign right of eminent domain. But this conclusion does not give any aid in determining what were the rights so acquired.

This piece of ground, so far as it was not covered by the waters of the lake, was shown on the plat of the Canal Trustees as "Michigan Avenue," and yet only a small strip of it is now or ever has been "Michigan Avenue," or any other avenue or highway. According to all the arguments made, all the decrees rendered, and according to all the long history of the title of this piece of public ground, extending over a period of nearly sixty years, it has now and, since its acceptance always has had, the character of a *public park*, and I am strongly inclined to the view that the rights of the parties hereto must be tested and finally determined by considering what is comprehended in the fact that it is a public park.

The Century Dictionary defines a park as:

"A piece of ground, usually of considerable extent, set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation."

Bouvier Law Dictionary defines a park to be

"A pleasure-ground in or near a city, set apart for the recreation of the public; a piece of ground enclosed for purposes of pleasure, exercise, amusement or ornament; a place for the resort of the public for recreation, air and light; a place open for everyone."

If the primary idea of a park is an ornamental and adorned tract of ground to serve as a place of free public resort, it cannot be denied that shelter for those who come is of primary importance; that buildings for public convenience are most essential, and that a park, both in the popular and in the legal sense of the term, cannot exist in the form of a va-

cant and unoccupied common devoid of all buildings of every character.

The views here expressed find support in the decision rendered by Judges Tuley, Horton and Burroughs, in the case of *Daggett v. City of Chicago*, 24 Legal News, 353,¹ where the same question now before this court, was there being considered, and in which decision, in speaking of the proposed Art Institute, then about to be erected on this same park, the court, among other things, said:

"Is such a building in a public park a use of such park for public purposes or for park purposes? There can be no doubt of the power of the legislature to declare that this Lake Park should be for the education as well as for the physical enjoyment and recreation of the masses of the people. Are not such institutions as art galleries usually found in public places or public parks? Is it reasonable to urge that it is a perversion of the uses of a public park that there should be a building upon it devoted to art purposes, filled with paintings and works of art to delight the souls of the people who visit such parks? Are parks necessarily to be confined to the works of nature? Certainly this is a contracted view of the objects of public parks, and should not prevail."

It is alleged in the cross-bill that certain buildings are a necessary part of a park:

"The administration, control, care and policing of a park renders it necessary that certain buildings be maintained for shelter, to provide for the public comfort, the safe keeping of implements and machinery, to supply light, power and sprinkling for trees and shrubbery." Also alleges that certain other buildings are convenient and usual in parks.

In these allegations the cross-bill alleges that which is common knowledge, and if the decree in the case of *Ward v. City*, only prohibited buildings "not consistent with the use of said public ground * * * for a public park solely and exclusively," then certainly the question here presented is in no wise foreclosed by that decree.

In addition to the foregoing, it should be noted that the

¹ Reported in this volume.—Ed.

only part of the present park to which the prohibitions of that decree relate, is the land "between the west line of Michigan avenue and the west line of the right of way and grounds of the Illinois Central Railroad Company," from Park Row to Randolph street, and does not, in terms, include the lands east of the Illinois Central Railroad right of way.

The same observations apply in general to the decree in the *Bliss Case*. The question there was wholly a question of the diversion of said ground from park purposes. The great Armory building proposed to be erected was to be and remain the property of the state; the use and occupation of the land to be used was to be in the state of Illinois, and to be perpetual, and was to be for no purpose remotely consistent with purposes of a public park. I hold that neither of these cases have judicially determined the question which these demurrers now present.

The question still remains, whether the original restrictions under which this tract was placed when the lots on Michigan avenue were sold, prohibit necessary park buildings. The plat which was recorded only shows a part of the present park tract as Michigan avenue. The unrecorded plat, upon which it is alleged sales of lots were made, designates it as "a common, to remain forever open, clear and free of any buildings or other obstructions whatever."

This piece of ground was, as already stated, according to all the arguments that have been made, and the pleadings and decrees, accepted as a park. If it is a park, it is not "Michigan Avenue" as shown on the recorded plat. If certain buildings are a necessary part of a park, as is alleged in the cross-bill, then a park and an unoccupied common are two different and inconsistent things. In that case it would seem that the operation of these limitations should be restricted to the prohibiting of only such buildings as are inconsistent with the use of said real estate for park purposes; otherwise, we should have the novel spectacle of the grant of certain grounds for park purposes, and restrictions at the same time imposed upon its use which would make it impos-

sible to utilize and maintain it as a park. It would be very much like the situation in the case of *Godfrey v. City of Alton*, 12 Ill. 29, cited on the argument, where it was said:

"All accretions to a public landing must necessarily attach to and form a part of it. Otherwise we should have the novel spectacle of a public landing separated from the water, as is in fact attempted in this case."

So, in this case, we should have the novel spectacle of a public park, without power on the part of the city to improve and maintain it as such.

These conclusions are somewhat enforced by the fact that a vast area of land, including very much the larger part of the park, has been reclaimed by the city at great expense, and that it was commonly understood that it was to become part of a park, not part of an unoccupied common. No steps have been taken by the complainant to prohibit the making of this addition to this public park.

I am, therefore, of the opinion that the restrictions alleged to exist in regard to the use of this park tract, should be construed consistently with the use of this ground as a public park if they can be so construed, and, if they do not admit of such construction but are to be given literal application as prohibiting all buildings, of every kind, including such as are necessary for park purposes, then they are either invalid, or at least, of such doubtful validity that the cross defendant should be left to his remedy for damages by an action at law.

"The issuing or continuing the writ of injunction is to some extent a matter of discretion of the court, and where the right infringed will create no irreparable injury or the injury is slight, that discretion is often exercised against the issuing of the writ of injunction. The court will balance the loss or inconvenience, and if the issuing of the writ will cause much loss or inconvenience to the defendants, and but slight to the complainant, it will refuse to use the court's strong arm to protect the complainant, but will leave him or her to an action of law." JJ. Tuley, Horton and Burroughs in the Daggett case.

The cross-defendant claimed an easement perpetual in its duration, not of light or air or passageway, but of unobstructed view across this entire park area, and for that purpose that the whole must be kept free from buildings. It is obvious that any ornamentation arising from diversifying the surface or planting trees will obstruct the view as effectually as would necessary park buildings. The claim of the cross-defendant is that the whole area of the park shall, according to the words appearing upon the original sales plat, perpetually remain "A common; to remain forever open, clear and free of any buildings or other obstructions, whatever."

The allowance of this claim to the extent insisted upon would render it impossible to improve this park as public parks are usually and ordinarily improved; would greatly detract from its availability as a place of public resort, which is one of the primary purposes of a park; and would, in a large measure, thwart the objects for which this land was reclaimed from the lake, thereby entailing upon the public perpetually the most serious embarrassment in its use of this park.

Thus balancing the interests of the parties, the claims of the complainant do not furnish to a court of chancery a reasonable or just basis for a perpetual injunction of the character prayed in the bill of complaint.

POINT IV of the demurrer is sustained. It seems quite clear to me that this court has no jurisdiction to prohibit the complainant from moving in any way he may be advised, to enforce the decrees that have heretofore been entered in the circuit court and in this court, respectively. Certainly this court has no semblance of jurisdiction in this proceeding to review any decree of the circuit court, and has no right to interfere with the complainant's attempting to enforce any such decree. Neither has this branch of this court any jurisdiction in this proceeding, or otherwise than by a bill of review or some other appropriate direct proceeding, to interfere with the operation of a decree heretofore entered

in this court. For it to attempt to do so, it seems to me would be subversive of all orderly procedure.

POINT V of the demurrer is also sustained. This court has no jurisdiction to determine the effect or validity of the act of March 14, 1903, in respect to the right of the cross-complainant to condemn, as under the power of eminent domain the rights of the complainant, if any. The scope, effect and validity of that law will be directly involved in any condemnation proceeding that may be instituted, and all matters in relation thereto must be determined by the court in the progress of such litigation, if any shall be instituted. No doubt the cross-complainant, by allegations in the cross-bill to which this part of the demurrer relates, intended that this court should determine whether or not this act conferred upon the park commissioners the power to make the contract alleged with the Field Museum, but the cross-defendant has not demurred to it on this ground, and consequently a decision on that point is not called for at this time.

POINT VI of the demurrer is overruled. The cross-bill is germane to the subject-matter of the original bill.

POINT VII of the demurrer, being a general demurrer, is overruled.

(Circuit Court of Peoria County.)

Mark M. Bassett

vs.

Thomas Fahey.

(1879.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY—EFFECT OF POSSESSION. A voluntary assignment for the benefit of creditors is not in itself void and where possession accompanies the deed, it will prevail over executions subsequently issued in the absence of legislation to the contrary.
2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—LAW OF 1877—INVENTORY OF ASSETS AND LIST OF CREDITORS—OMISSION OF—EFFECT. The omission to make an inventory of assets and a

list of creditors and attach the same to an assignment for the benefit of creditors, as provided in the law of 1877, does not make the assignment void.

3. **SAME—BOND OF ASSIGNEE—EXECUTIONS BEFORE BOND GIVEN.** A voluntary conveyance for the benefit of creditors is not void as to an execution served after the deed has been delivered but before the assignee has entered into the bond provided in the law of 1877.
4. **SAME—WHERE TITLE PASSES TO ASSIGNEE—WHEN TO MAKE INVENTORY AND VALUATION AND ENTER INTO BOND.** For the purpose of taking possession of the estate of the debtor the title of the assignee vests from the time of the delivery of the deed of assignment and he has a reasonable time thereafter to see that an inventory and valuation is made and in which to enter into his bond. These acts, when performed relate back to the time of the delivery of the deed of assignment. Sections 3 and 12 of the act lead to this conclusion.
5. **SAME—NOTICE—FAILURE TO ACKNOWLEDGE OR RECORD DEED WHERE POSSESSION OF PROPERTY TAKEN.** Where possession is taken of the debtor's property under a voluntary assignment for the benefit of creditors, a failure to record or acknowledge the deed does not render it fraudulent as to a subsequent execution creditor. Possession is sufficient notice to the latter.

Action of replevin. Heard before Judge McCulloch. The facts are stated in the opinion of the court.

MCCULLOCH, J.:—

This is an action of replevin brought to recover certain articles of jewelry claimed by plaintiff under a deed of assignment dated July 2d, 1877, made by James A. Hutchinson for the benefit of his creditors, which the defendant, as constable of Peoria county, levied upon by virtue of an execution, dated on the same day as the assignment.

No question is made as to the validity of the execution, nor that it became a lien upon the property of Hutchinson from the time it came into the hands of defendant, as constable, which time the proof shows to have been at 9 o'clock a. m. of the day of its date.

Nor is any question made as to the good faith of the assignment, any further than that both plaintiff and Hutchinson at the time of the execution of the deed of assignment

knew of the pendency of the suit and that judgment was about to be rendered in the case wherein said execution was issued. This fact alone does not prove the assignment to have been fraudulent as to creditors.

It appears from the evidence that Hutchinson had been contemplating the making of an assignment for several days previous to the second day of July, and possibly the papers were prepared before that date, but its actual execution and delivery took place early in the morning of that day. The day preceding this transaction, the act of May 22, 1877, concerning voluntary assignments came in force, but it appears in proof, that the attention of the assignee was not called to the same until some time during the same day, but after the execution came into the hands of defendant. It was therefore not in the mind of either Hutchinson or the plaintiff at the time to follow the provisions of that statute.

It is in proof that plaintiff took possession of the property in question, claiming title under said assignment, at the hour of 8 o'clock a. m. on the second day of July, so that if his title under said deed is a good one, it takes precedence of defendant's title by about an hour.

The act of May 22 came in force July 1, 1877. At the time plaintiff took possession of the property in question, several plain provisions of this act had not been complied with.

The debtor had not verified by his oath the schedules of creditors and assets attached to the deed; he had not acknowledged the execution of the deed, nor had it been recorded; the assignee had not filed in the office of the county clerk any inventory and valuation of the property coming into his hands by virtue of said assignment, nor had he entered into any bonds for the faithful performance of his duties as such assignee: Session Laws 1877, p. 116.

Both plaintiff and Hutchinson rested in the belief that they had done all that the law required them to do. It cannot, therefore, be charged upon them that they, or either of them, intentionally omitted any duty imposed on them by the law.

It is now contended, on the part of the defendant, that,

notwithstanding plaintiff's possession, these omissions render the deed of assignment void as to defendant, and that having acquired a valid lien before the statute had been fully complied with, in the foregoing particulars, he has a right to retain the same, by virtue of his levy.

The proof further shows, that on the same day of the assignment, plaintiff's attention was called to the provisions of the act of May 22nd, and that thereupon, he immediately set about complying with its terms. He procured the affidavit of Hutchinson to be annexed to the schedules already attached to the deed of assignment. He also procured the acknowledgment of Hutchinson to the execution of the deed, to be duly certified thereon by a notary public. No objection has been urged to these instruments for deficiency in form or substance. Plaintiff also prepared an inventory and valuation of the estate, so far as the same had come to his knowledge, which, having been duly verified by his own oath, he filed in the office of the clerk of the county court, and then and there executed a bond as required by the statute, and took the receipt of the clerk therefor. No objection is taken to these papers for defect, either in form or substance. These documents were all executed and (so far as necessary, to be filed in the clerk's office), were filed on the 3d day of July. The deed also bears the file mark of the county clerk, dated July 3d, but it was not filed for record in the recorder's office until the 6th day of August.

It is now too late to say, nor is it claimed, that a voluntary assignment by a debtor for the benefit of his creditors is, in itself, void. It is also settled that where such an assignment is fairly made, and possession accompanies the deed, it will prevail over executions subsequently issued, unless there be something in recent legislation to render it void. This point is decided by the supreme court in a case very similar to the one at bar: *Wilson v. Pearson*, 20 Ill. 81, followed and approved in *Myers v. Kinzie*, 26 Ill. 36.

It is now claimed that under the act of May 22nd, 1877 (Laws of 1877, p. 116), no deed of assignment, whether accompanied with possession or not, can take effect as against

creditors until the provisions of that act have been fully complied with, up to and including the filing of the bond by the assignee.

The point thus raised is one of very grave importance requiring for its solution a close examination of the statute in question, and a careful comparison thereof with other statutes in force.

By the first section it is provided:

"That in all cases of voluntary assignments hereafter made for the benefit of creditor or creditors, the debtor or debtors shall annex to such assignment an inventory, under oath or affirmation, of his, her or their estate, real and personal, according to the best of his, her or their knowledge; and also a list of his, her or their creditors, their residence and place of business, if known, and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee or assignees the title to any other property not exempt by law, belonging to the debtor or debtors at the time of making the assignment, and comprehended within the general terms of the same."

It is very evident that the making of the inventory of assets and the list of creditors and annexing the same to the deed, are not conditions precedent to the taking effect of the deed, so as to pass title to the assignee, nor are they necessary parts of the deed; for it is provided in the eighth section:

"That no assignment shall be declared fraudulent or void for want of any list or inventory, as provided in the first section of this act."

The same section then goes on to provide for a compulsory disclosure on the part of the debtor, of the condition of his estate, the names of his creditors and the amounts due to each, with their places of residence.

It is objected that the deed of assignment is void because the assignee had not, at the time the execution came to defendant's hands, entered into bonds as provided by law for the faithful execution of his duties as such assignee.

By section 3 of said act it is provided:

"That the assignee or assignees shall also forthwith file with the clerk of the county court, where such assignment shall be recorded, a true and full inventory and valuation of said estate, under oath or affirmation, so far as the same has come to his or their knowledge, and shall then and there enter into bonds to the people of the state of Illinois, for the use of the creditors in double the amount of the inventory and valuation, with one or more sufficient sureties to be approved by said clerk, and the said clerk shall give a receipt therefor, and the assignee or assignees may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment as respects the collection of debts and the sale of real and personal estate."

By section 12, it is provided that:

"In case any assignee shall fail or neglect, for a period of twenty days after the making of any assignment, to file an inventory and valuation, and give bonds as required by this act, it shall be the duty of the county judge of the county where such assignment may be recorded, on the application of any person interested as creditor or otherwise, to appoint some one or more discreet and qualified person or persons to execute the trust embraced in such assignment; and such person or persons, on giving bond with sureties, as required above, of the assignee or assignees named in such assignment, shall possess all the powers thereby, and by this act conferred upon such assignee or assignees, and shall be subject to all the duties hereby imposed, as fully as though he or they are named in the assignment," etc.

By reading these two sections in connection, it will be perceived that certain acts are to be performed by the assignee under the deed of assignment before he is required to file his bond. He must make an inventory and a sworn valuation of the estate, so far as it has come to his knowledge. Upon this valuation the amount of the penalty of his bond is fixed. The making of the inventory and valuation necessarily presupposes an acceptance of the trust. A deed of

assignment, like every other deed, in order to pass title to the assignee, requires a delivery by the grantor and an acceptance by the grantee. In this instance, the assignee accepted the trust in writing by uniting with the debtor in the signing of the deed. A delivery of the deed to him after such signing imposed upon him the duty to proceed with the execution of the trust. The deed cannot be recorded as an executed deed until its delivery, either actually or constructively. But the taking possession of the deed by the assignee, and assuming to act under it, amounts to an actual acceptance of the trust. The making of an inventory and valuation necessarily precede the execution of the bond. An acceptance of the trust therefore necessarily precedes the filing of the bond by the assignee.

The first point to be determined is at what time the title as between the parties to the deed passes to the assignee. A reading of the third section alone would seem to indicate that, for the purpose of taking possession of the estate, preliminary to the making of the inventory and valuation, the title passes to the assignee; and that he be allowed a reasonable time thereafter within which to perfect the title, so as to enable him to collect debts and sell the property of the debtor. We might well stop here in the discussion of this point, for it appears from the evidence that the assignee used all reasonable diligence, after acceptance of the deed in making and filing this inventory and valuation, and in executing his bond as required by law. His acts in this respect being within a reasonable time, must be held to relate back to the execution of the deed.

But a much more potent reason is found in section twelve. Irrespective of the statute, by an acceptance of the deed the assignee becomes the trustee of all the creditors, and any subsequent renunciation on his part does not affect the validity of the conveyance. Burrill on Assignments, Ch. 24. Now if it be the intention of this statute to postpone the taking effect of the deed until a bond is filed, no trust is created until that has been done, and no rights become vested

in the creditors. The deed may therefore be revoked by the debtor, for it is in the nature of a deed of assignment, that it may be revoked at any time before rights have become vested in it. Burrill on Assignments, Ch. 34.

But in section 12 it is provided, that if the assignee shall fail or neglect, for a period of twenty days after the making of the assignment, *to file an inventory and valuation, and give bond as required by law*, it shall be the duty of the county judge to appoint a proper person to execute the trust, who shall likewise file an inventory and give bonds in like manner as the grantee in the deed. Now if the title does not pass out of the debtor until the inventory and bond are filed, then the debtor has it in his power, in case the assignee appointed by the county judge is not acceptable to him, to defeat the operation of section twelve *in toto*, by a revocation before the new trustee has filed his bond.

The evident intent of section twelve is to preserve the trust for the benefit of the creditors, and for this purpose the assignee has twenty days in which to file his inventory, valuation and bond. If at the end of that time he has failed to comply with the law in this respect, the county judge may appoint some one to execute the trust. The statute therefore preserves the trust for the benefit of creditors, although no inventory, valuation or bond be filed by the first assignee.

The deed is therefore valid and binding between the parties, from the time of its execution and delivery, although no bond be given, and must be held good as against execution creditors, unless some other fact intervenes, sufficient to render it fraudulent and void as to them. In Missouri, where a statute very similar to this one is in force, the law is so held: *Hardcastle v. Fisher*, 24 Mo. 70.

It is further objected that this deed is void as to defendant, because at the time the execution came into his hands as constable, it was neither acknowledged nor recorded. By section one of the act in question it is further provided that:

"Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the

same reside, or where the business in respect of which the same is made has been carried on; and in case said assignment shall embrace lands or any interest therein, then the same shall also be recorded in the county or counties in which said land may be situated."

If this provision were to be interpreted without reference to any other legislative enactments, it would be somewhat difficult to determine the exact meaning of the language employed. What is an acknowledgment? Before what officer must it be taken? How shall it be certified? Is the acknowledgment an essential part of the deed? What is the purpose of recording the deed? What effect is the recording of the deed intended to have by way of notice to third parties? Does the recording of the deed dispense with the necessity of taking possession of personal property, and so vest title thereto wherever situated in the assignee? Does the deed by being recorded in the county of the debtor become effectual to pass the title to personal property, wherever situated, while as to real estate the title becomes vested in the assignee only when recorded in the county where the land lies?

These questions and many others that might be suggested this statute leaves unanswered. We must therefore look elsewhere for its true interpretation.

Section 28, ch. 30, R. S. 1874, on conveyances, requires all deeds concerning real estate to be recorded in the county where the land is situated. Section 31, provides that deeds relating to realty, recorded, although not acknowledged according to law, shall be notice to subsequent purchasers and creditors. Several other sections of the same statute provide the manner and form of acknowledgments to which special reference need not be made. Applying the foregoing provisions to the deed in question it would take effect as to lands so as to be good as against creditors only when recorded in the county where such lands are situated, but although not acknowledged according to law, it would be notice from the time of its being recorded. There appears to be no good rea-

son why these provisions should not apply to the deed in question. It is however the uniform ruling of the supreme court that if possession be taken under a deed to real estate, it need not be either acknowledged or recorded.

There appears, however, to be this difference between deeds of real estate and those relating to personal property. While a deed of real estate, although not acknowledged according to law, may be recorded, and so become notice to creditors, there appears to be no statute authorizing the recording of a deed relating to personalty without its being duly acknowledged.

As already seen, a deed of personalty made in good faith, accompanied with possession is good against creditors not having a lien, but it is also true that unless possession accompanies the deed it is *prima facie* at least void as to creditors. The object of recording deeds of personalty is therefore to provide, in certain instances, for the vesting of an interest in the grantee although he may not acquire the immediate possession.

Does the acknowledgment then become an essential part of the deed? As already observed, there is no statute authorizing the recording of a deed of personalty unless it be duly acknowledged. So far, therefore, as the efficacy of a deed as to personal property depends upon its being recorded, it must also be acknowledged; for by sec. 30, ch. 30 R. S. 1874, it is provided that:

"All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."

The deed in question being one authorized by law to be recorded, it must, as to the personalty, be adjudged void as to creditors and subsequent purchasers without notice, until

it shall be duly acknowledged and recorded. This is the plain import of the language of the statute. But the acknowledgment of the deed is only a pre-requisite to its being recorded. That ceremony does not add to the force of the instrument as a common law deed, nor does the want of it detract anything from its efficacy as such. In the case of a married woman's deed, the acknowledgment under the old laws was held to be an essential part of the deed. The reason was that she being by common law disabled from making a deed, derived her power to do so wholly from the statute and by that statute, she was required to acknowledge her deed. It was therefore held that without her acknowledgment her deed was void. In this case the grantor is by common law capable of making a deed without an acknowledgment, and therefore if there be no statute rendering his deed invalid unless acknowledged, the courts cannot hold his deed to be void.

It is, however, insisted that this, being a voluntary conveyance for the benefit of creditors, and without consideration, is fraudulent and void as to creditors unless the deed is recorded. The ground of objection seems to be that the legislature having undertaken to legislate upon a subject of such vital interest, it must be presumed they intended to cover the whole ground, and that therefore when the statute says that such deeds must be recorded, it follows by necessary implication that unless recorded they are void. It might be a sufficient answer to this position to say the statute has not so declared, and we have no right to add to the statute.

But as already observed, this statute evidently had reference to the existing laws upon the subject of acknowledging and recording deeds. If this is a voluntary conveyance without valuable consideration, what says the law as to the necessity of its being recorded? (On the subject of voluntary conveyances being subject to existing liens, see *Willis v. Henderson*, 4 Scam. 13; *Goodwin v. Mix*, 38 Ill. 115; *Dole v. Olmstead*, 41 Ill. 344; *O'Hara v. Jones*, 46 Ill. 228.) Sec-

tion 6 of the Statute of Frauds (Rev. Stat. 1874, p. 541), provides that:

“Every conveyance of goods and chattels, on consideration not deemed valuable in the law, shall be taken to be fraudulent, unless the same be by will duly proved and recorded, or by deed in writing duly acknowledged or proved and recorded, as in the case of deeds of real estate, or unless possession shall really and *bona fide* remain with the donee.”

What the effect of the statutes in question may be upon personal property not actually reduced to possession, it is not necessary for us now to decide. In this case the possession having accompanied the deed, it is very evident, it is not rendered void by the Statute of Frauds. Chap. 95, Rev. Stat., relative to chattel mortgages, provides that no chattel mortgage not accompanied with possession of the property, shall be valid as against third persons, unless acknowledged and recorded as therein provided. The statutes now quoted, seem to be the only ones bearing upon the question at issue. Not one of them in terms renders this deed void if the creditor had notice thereof. The uniform course of decisions in this state, is that possession under a deed is notice of the possessor's title, whether the property be real or personal.

In the absence of any statute to the contrary, I am bound to hold the decisions in *Wilson v. Pearson*, 20 Ill. 81, and *Myers v. Kinzie*, 26 Ill. 36, conclusive of this question.

The finding of the court will therefore be for plaintiff upon the issues joined.

(Circuit Court of Cook County.)

In the Matter of Amanda B. Thompson.

(January, 4, 1872.)

1. **OFFICERS—DE FACTO—ACTS OF—COLLATERAL ATTACK.** Where a person exercises the duties of an officer performing the functions by color of office, he is an officer *de facto* and his right to office cannot be collaterally attacked.

2. SAME—COMMITMENT BY DE FACTO JUSTICE OF PEACE—HABEAS CORPUS. The act of a justice of the peace *de facto* in committing a person to jail cannot be attacked on habeas corpus, where, if he had been an officer *de jure* the commitment would have been proper.

· Petition for *habeas corpus*. The facts are stated in the opinion of the court. Heard before Judge John G. Rogers.

ROGERS, J.:—

It appears by the petition for the writ of *habeas corpus* filed by Amanda B. Thompson, the return of sheriff to said writ, and the copy of the *mittimus* under which she was committed, that said petitioner was examined before John Summerfield, acting as police magistrate, upon a charge of larceny; that she was found guilty of the charge and held to answer in the criminal court, and, failing to give bail, was committed to the custody of the sheriff, by whom she is detained in jail. Her discharge is sought upon the alleged ground that Summerfield, at the time he examined the charge and issued the *mittimus*, was not a justice of the peace of Cook county. It was agreed upon the hearing that Summerfield was regularly elected and commissioned police magistrate of the city of Chicago some years ago; that he was not appointed a justice of the peace by the governor, under the constitution, and that at the general election, duly called and held in November, 1871, he was elected a police magistrate for the city of Chicago, took the oath of office and gave bonds as such, but that the governor of the state has failed to issue a commission to him as such police magistrate, and that the common council of the city has designated him to act as police magistrate for the south division of the city.

It also appeared that he was acting in that capacity at the time he issued the *mittimus*, under which the petitioner is held, although he signed it as "John Summerfield, Justice of the Peace."

The question as to his right to the office, whether he held an office *de jure*, was the only one discussed by the learned

gentlemen appearing for and against the petitioner, and seemed to be the only one upon which a decision by the court was desired. But in the view of the case taken by me, I do not feel that it is either right or proper that I should undertake to decide that question. It is not necessary to the disposition of the case, and, as such a decision would not settle the disputed *right* to the office, I do not feel inclined to investigate it fully or declare my opinion upon it.

There is more than one legal proceeding by which it can be finally and fully determined whether Summerfield is *by legal right* a police magistrate or justice of the peace. This proceeding is not one of them.

John Summerfield, as it appeared by the agreed statement of the facts, down to the election held last November, a police magistrate of this city, duly elected and commissioned, was, at that election, voted for and declared elected for another term, executed bond as such, took the oath of office, and was subsequently designated by the common council of the city to act as police magistrate. He acted in that capacity, professing to be such officer.

It has often been held by the courts of last resort, in several of the states, and expressly so by the supreme court of this state, that when a person exercises the duties of an officer, performing the functions by *color* of office, he is an officer *de facto*, and his *right* to the office cannot be questioned collaterally. See *Town of Lewiston v. Proctor*, 23 Ill. 533.

Also, the People on the relation of *People ex rel. Ballou v. Bangs*, 24 Ill. 184, in which it was decided that, although Judge Bangs was not judge of the circuit court, *de jure*—his election not being authorized by the constitution, and therefore void—yet he had *color* of office, and, acting as he did, under that *color*, his acts were valid.

The court, however, decided that he did not hold the office of judge *de jure*, and ousted him. This was a proceeding to determine who was really and legally the judge, and if it is desired to test the same question so far as John Summerfield is concerned, the way is open and clear.

In *People ex rel. v. Maynard*, 14 Ill. 419, the supreme court decided that holding office under an old law, which did not make him a justice of the peace, could not be such justice under the *then* new constitution. That was a direct proceeding to test the question of *right*, and the court held that he was not a justice of the peace *de jure*. "But," says the court, in referring to this Maynard case, when deciding the Proctor case, *supra*, "had he assumed to act under his commission as a justice of the peace, it by no means follows that we should have held his acts void."

These authorities are conclusive of the question presented here. I am bound by them, and whatever opinion I may entertain upon the right of Summerfield to the office, I am decidedly of opinion that his act under color of office in committing the petitioner was not void. Let the petitioner be remanded to the sheriff, to be held in custody under the *mitimus* issued by Summerfield.

(Circuit Court of Cook County.)

The People ex rel. John Mullin and Peter McHugh

vs.

Seth F. Hanchett, Sheriff.

(1886.)

1. **HABEAS CORPUS—PRACTICE ON RETURN.** By the American practice on the return to a habeas corpus writ the relator may demur, or move his discharge, which operates as a demurrer, may plead as for example by way of confession and avoidance or may by replication reply to the facts contained in the return.
2. **HABEAS CORPUS—DEMURRER TO RETURN—EFFECT.** By a demurrer to a return to a writ of habeas corpus, the facts set forth in the return are admitted but are, however, alleged to be insufficient in law to justify the detention.
3. **EXECUTIONS AGAINST THE BODY—CIVIL PROCEEDINGS—WHEN AUTHORIZED.** An execution against the body of the defendant in Illinois is only authorized in a civil suit in the cases mentioned in the statute namely: Where there is a tort judgment

against the defendant or where he has been held to bail upon a writ of *capias ad respondendum* provided by law or where he has refused to deliver up his estate for the benefit of his creditors.

4. **ARREST IN CIVIL CASE—WHEN WRIT INSUFFICIENT.** Where the relator in a habeas corpus case is held upon a writ issued in a civil proceeding which shows that it was issued without any order of court and also fails to show on its face that it was issued in a case where judgment was obtained for a tort committed by the defendant or a case in which he had been held to bail upon a writ of *capias ad respondendum* or that he has refused to surrender his estate for the benefit of creditors; no presumption arises that its issuance was proper and the writ is void.
5. **ARREST IN CIVIL CASE—WHEN WRIT PRESUMED PROPER.** When writ upon which relator is held purports to be issued in one of the three cases mentioned in the statute it is presumed to be a proper writ.
6. **ARREST IN CIVIL CASE—TORT ACTION—WHAT SHOWS.** A writ reciting that the amount recovered by the plaintiff was "by said court adjudged to the said plaintiff for his damages in his action of trespass" shows upon its face that it was issued in a tort action and justifies the detention.

Petition for *habeas corpus*. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

H. O. Daid & C. A. Knight, for relators.

Brandt & Hoffman, for respondent.

TULEY, J.:—

The sheriff makes return to the writ of *habeas corpus* that he holds relators by virtue of a certain writ called a *capias ad satisfaciendum*, a copy of which he attaches; also that the first arrest was made June 30th, 1886, when the relators were taken to the county court upon their petition to be discharged under the Insolvent Debtors' Act; that their petition was denied and that relators having unsuccessfully prosecuted their appeal to the circuit court, thence to the appellate and thence to the supreme courts, he, upon the proper order of affirmance being filed in the county court, again on the 26th of November, 1886, took the relators into custody

under said writ.¹ To this return the relators demurred as insufficient in law to authorize the detention.

Formerly by the common law practice the return had to be taken as true, and could not be traversed, but by the American practice the relator may demur, or move for his discharge, which operates as a demurrer; may plead, as for example, by way of confession and avoidance, or may by replication reply to the facts contained in the return.

By the demurrer the facts set forth in the return are admitted, but are alleged to be insufficient in law to justify the detention.

The sheriff here returns that he detains the prisoners by virtue of a certain writ of *capias ad satisfaciendum*, and the issue made is whether or not that writ is sufficient in law, or, in other words,—is the writ a valid and legal writ?

Sec. 4 of chap. 77 on Judgments and Executions provides, that all executions shall run “against the lands, tenements, goods and chattels of the person against whom the same is obtained, or against his body, when the same is authorized by law.”

When is an execution against the body “authorized by law?” The answer is found in the next section, sec. 5:

“No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad respondendum*, as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors.”

In the interest of the liberty of the citizen, the construction of this clause must be that the expression of the cases in which the writ may issue precludes the idea that it may be issued in any other case. There is no form of this writ prescribed by statute in this state.

The writ of *capias ad satisfaciendum*, according to the common law practice, contained recitals showing, among other

¹ See *In re John Mullen, et al.*, 112 Ill. 551.—Ed.

details, the kind of action and the nature of the judgment upon which it was issued.

In this state, or at least in this county, the form that has been used has omitted the details of the proceedings in the case, but I find no decision adjudicating upon its sufficiency. If the form in use by the common law had been followed in our practice, there would be no difficulty in determining whether or not the writ was issued in any of the cases authorized by section 5.

When the writ shows that it was issued without any order of the court, and it also fails to show on its face that it was issued in a case where judgment was obtained for a tort committed by the defendant, or in a case in which the defendant had been held to bail upon a writ of *capias ad respondendum*, or that the defendant had refused to deliver up his estate for the benefit of the creditors,—no presumption arises that its issuance was authorized by law. That was the kind of a writ issued in the Lambert case and which I held, upon the issue joined in that case, to be a void writ. If the writ purports to have issued in one of the three cases mentioned, in the statute, then the presumption arises that it was properly issued, but when it does not purport to be so issued, no such presumption arises. It seems to me that upon the issue made by the demurrer to a return of this kind, the spirit of our supreme court decisions, which have been so broadly in favor of liberty, demand this construction, to-wit, that the writ show upon its face that it was issued in one of the three cases mentioned in section 5 of chapter 77 on Judgments, or that it was issued upon the order of the judge.

The writ in this case differs widely from the writ in the Lambert case. In that case the writ recited neither the kind of action, nor the character of the judgment. The recital was of the recovery, i. e. a judgment against the defendant for \$5,000, which "by said court was adjudged to the plaintiff for his damages." In the case at bar the writ recites

that the amount recovered by the plaintiff was "by the said court adjudged to the said plaintiff for his damages *in his action of trespass*." All trespasses are torts, and it therefore appears upon the face of the writ that it was issued on a judgment in an action of trespass, i. e. for a tort committed by the defendant, and was therefore authorized by law, it being in one of the three cases in which such writs are authorized by said section 5. It also appears by the return in this case that the relators by all the courts from the county court to the supreme court, have been denied a discharge under the Insolvent Debtors' Act; and by the opinion of the supreme court it appears that it was upon the ground that malice was the gist of the action upon which this writ issued, and, therefore, necessarily, that it was for a tort. See *People ex rel. Robinson v. Hanchett*, 111 Ill. 90.

Some other points are made by counsel for relators, based, largely, upon my opinion in the Lambert case. It is apparent from that opinion that it is based upon two main points. 1st: that upon the issue joined, the return was insufficient, because the writ did not show that it was issued for a tort or in any of the cases mentioned in section 5; and, 2nd, because a board payment was made, as shown by the return, upon a Sunday *a dies non*.

Upon the hearing of this case a provision of the statute was cited which was not cited in the Lambert case, and which escaped the notice of the court. It is sec. 65, ch. 77. It provides that a debtor, when arrested upon an execution against the body, "shall be conveyed to the county jail * * * and kept in safe custody until he shall satisfy the execution or be discharged according to law."

This statute incorporates itself into the commitment and is a command to the sheriff which in and of itself fixes a limit to the term of imprisonment, and is of itself an answer to all the other points made by relators, except that in regard to the payments of the board money. As to that, the presumption is that the first week's board was refunded, as

it was not needed, and as to the last payment, I am of opinion that the sheriff had a right to demand it before making the rearrest.

In this case the return of the sheriff to the writ of *habeas corpus* will be adjudged sufficient and the relators will be remanded to the sheriff's custody.

(County Court of Cook County.)

Gertrude Eichhold

vs.

Isaac Greenebaum Executor of the last will of Michael
Eichhold, deceased.

(1869.)

1. EXECUTORS AND ADMINISTRATORS—INVESTMENT OF FUNDS—PAYMENT OF LEGACIES—POWER OF COUNTY COURT. The county court has the same power to compel an executor to pay a legacy or invest funds belonging to a legatee so that they may draw interest, that a court of chancery has.
2. SAME—DERIVATION OF POWERS OF COUNTY COURT. The county court derives its powers in this regard from that article of the Illinois constitution which provides that the "jurisdiction of said court shall extend to all probate matters."
3. EXECUTORS AND ADMINISTRATORS—HOW ACCOUNTABLE FOR INTEREST. *Prima facie* an administrator or executor is not chargeable with interest for the first year, and thereafter he is *prima facie* chargeable with interest on all money in his hands not necessary to pay claims and expenses. He is in either case chargeable with interest on money of the estate which he himself uses or interest which he actually does receive.
4. ADMINISTRATION OF ESTATES—GENERAL SPECIFIC LEGACIES—PAYMENT OF INTEREST THEREON. A specific legacy draws interest from the death of the testator; a general from the time it is payable except when a father bequeaths it to his infant child and there is no other means to support it, or where a wife receives it in lieu of dower or a creditor receives it in payment of an antecedent debt. In these latter cases, the general legacy draws interest from the death of the testator.

5. ADMINISTRATION OF ESTATES—INTEREST ON GENERAL LEGACIES—WHERE APPLIED. If an executor invests a general legacy and receives interest thereon, the interest, except in the three cases before mentioned, goes into the residuum of the estate and not to the general legatee.
6. ADMINISTRATION OF ESTATES—STATUTE OF WILLS—PAYMENT OF LEGACIES—BOND. Under the Statute of Wills of Illinois, a specific legacy is deliverable at any time, a general, one year from the death of the testator if the estate is free from debt or there is an abundance of funds to pay the debts and legacies upon the legatee executing a sufficient bond with security. The amount of the bond lies in the sound discretion of the court in view of all the circumstances of each particular case.

Petition for payment of legacy. Heard before Judge Thomas B. Bradwell. The facts are stated by the court.

STATEMENT.

The testator, Michael Eichhold, died in or about the month of September, 1866, leaving his will, which was admitted to probate on the 24th day of October, 1866, in this court, and letters testamentary issued to the respondent.

The testator, after providing for the payment of his debts and funeral expenses, bequeathed to his wife, Gertrude Eichhold, "the sum of one thousand dollars," and one-third of the residue of his estate, and the other two-thirds to his son Abraham.

The said Gertrude Eichhold has filed her petition in this court, alleging that there has been an adjudication of claims; that the whole amount of claims against the estate does not exceed two hundred dollars; that there is over seven thousand dollars in money now in the hands of the executor, and that the same can now be loaned on good security at ten per cent., and prays that the executor may be compelled to pass over to her the amount she is entitled to as legatee or that the same may be loaned out at interest by the executor, and that such interest accruing may be paid over to her for her support.

The executor answered the petition, admitting the material facts stated therein to be true, but claimed that the money

might yet be needed for the payment of debts against the estate.

Two witnesses were sworn, who stated that they had known the deceased well for years, and that they did not believe he owed one cent at the time of his death.

Messrs. Gookins & Roberts, for the petitioner, made the following points:

First—One year is generally allowed the executor to ascertain the situation of the estate before he can be compelled to pay a legacy. 2 Williams on Executors, 1,191.

Second—But this allowance is merely for convenience, in order that the debts may be ascertained.

Therefore, if the condition of the estate permits, the executor has power to pay sooner. *Id.* 10, ves. 13. *Pearson v. Pearson*, 1 Sch. and Lef. 12.

Third—But if it clearly appears that a surplus will remain, the court will, by anticipation, direct proportionable payments to legatees. 2 Williams on Executors, 1,191.

Fourth—However it may be in respect to the payment of legacies, there is no doubt of the power to direct the money to be invested at any time, and this is based upon the general equity powers of the court. 2 Williams on Executors, 1,200 et seq.

Messrs. Runyan & Avery, for respondent, claimed:

First—That the county court had no power to order a legacy paid within two years, and if such power existed it could only be exercised by a court of chancery.

Second—That the executor could not be compelled to invest the money or to account for the interest within a year from the date of his letters.

Third—That the interest that might be made on the \$6,000 the first year would not belong to the respondent, but would go into the residuum.

OPINION.

BRADWELL, J.:—

In regard to the power of the court to grant the relief prayed for in this case, there is no doubt of the power of a

court of chancery, at any time when the estate is in a proper condition, to compel the executor to put the funds at interest, or deposit them in a savings bank where they may accrue interest pending the settlement of the estate, and until legatees may come and claim their portions.

I am clearly of the opinion that the county court has the same power to compel an executor to pay a legacy, or invest funds belonging to legatees (when it has all the parties interested in the fund before it,) that a court of chancery has.

This results from the general power of the court over the subject matter as given in the constitution of the state and the laws passed under it. The constitution says, (article 5, section 18,) "the jurisdiction of said court shall extend to all probate jurisdiction." If the legislature should today repeal all statutes in regard to probate jurisdiction, still the county court could go on legally under the common and ecclesiastical law, grant probate of wills, and settle estates. *In re Gregory's Administrator*, 19 Ohio, 357; *Lockhart v. Public Administrator*, 4 Bradf. S. R. 21; *Campbell v. Logan*, 2 Bradf. S. R. 90; *Blackburn et al. v. Hawkins*, 1 Eng. 50.

Prima facie, an administrator or executor is not chargeable with interest for the first year, but if during that time he uses the money himself, or receives interest for it, he must be charged with all he receives or makes by the use of the money. *Prima facie*, after one year he is chargeable with interest on all money in his hands not necessary to pay claims and expenses, and even in his first yearly account and report it is his duty to show that it contains a true statement of all interest received and how the funds of the estate have been kept.

He must also, during the settlement of the estate, keep a sufficient amount of funds on hand to pay all claims as they become due. If the money of the estate remains uninvested and claims are allowed against it, they draw interest at 6 per cent, and the estate loses \$12 on each hundred each year. In this way a solvent estate may be made insolvent.

No absolute rule can be established for determining when

an executor must be charged with interest. Each case must depend on its own particular circumstances. Not so in regard to legacies. *Betzer's Executor v. Hahn et al.*, 14 S. & R. 232; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Ogilvie v. Ogilvie*, 1 Bradf. S. R. 356; *Schieffelin v. Stewart et al.*, 1 Johns. C. 620.

The six thousand dollars bequeathed to the petitioner is a general, and not a specific, legacy. A specific legacy carries interest from the death of the testator; a general legacy draws interest only from the time it is payable, except when a father bequeaths to his infant child and makes no other provision for its support; a husband to his wife in lieu of dower; or where a legacy is given for a preexisting debt, in which cases they draw interest from the death of the testator. It was at one time held that the widow was within the exception, but it is now settled that she is not. *Martin v. Martin*, 6 Watts, 67; 1 Roper on Legacies, 379; Launder on Legacies, 430-2; Lomax on Executions, 154; *Corbin v. Wilson*, 2 Ash. 178.

Treating the subject independent of our statute, a specific legacy, is so much carved out of the testator's estate, and set off for the legatee, that it may be delivered to him at any time after it is determined. It will not be necessary to appropriate it for the payment of the debts of the deceased. If it is a cow, and she has a calf, before the delivery, the calf belongs to the legatee. If it is a note and interest is paid to the executor on it, the interest belongs to the legatee and does not go into the residuum.

It is not so with a general legacy; a general legacy draws no interest until due, and with the exception named above, is not due till one year after the death of the testator.

If invested by the executor before due the interest received thereon goes into the residuum and not to the general legatee. *Hammond v. Hammond*, 2 Bland Ch. 306; *Wood v. Penoyre*, 13 Ves. 326; *Sullivan v. Winthrop et al.*, 1 Sumner R. 1; Alnutt on Wills, 375; *Garthshore v. Chalie*, 10 Ves. 1; *Pearsons v. Pearsons*, 1 Sch. and Lef. 10; Mathews on Executors, 183; Roper on Legacies, 1253; Swinburn on Wills, part 1,

page 36; 4 Buens Eccl. Law, 511; 2 Redfield on Wills, 569, and notes, where this whole subject is ably discussed by the learned author.

Our statute of wills, section 127, while it does not change the time of payment of legacies from that as laid down by the authorities above, provides that "whenever it shall appear that there are sufficient assets to satisfy all demands against the estate, the court of probate shall order the payment of all legacies mentioned in the will of testator. The specific legacies being first satisfied." The 129th section provides that executors shall not be compelled to pay legatees until a refunding bond is given. Under this statute a specific legacy may be delivered at any time, and a general legacy at the expiration of one year from the death of the testator, if the estate is free from debt, or if there is an abundance of assets to pay the debts and legacies, upon the legatee executing the required bond with security. The county court has sufficient power over the executor to compel him to deliver the legacy, but should not make its order upon probabilities or speculate upon the chances. It should be duly shown that the estate is in such a condition that no one will or could be injured by ordering the legacy delivered. Alnutt on Wills, 375.

In England and Virginia, under statutes like our own, it has been held that the amount of security to be demanded by the executor is to be determined by the sound discretion of the court, governed by the circumstances, and the length of time which has intervened, the means which have been used to give notice to creditors and the probability of outstanding debts.

Chief Justice Marshall says, if, after due publication and notice, creditors will still lie by, all courts ought to protect the executor from any claim beyond the indemnity which a court of competent jurisdiction has directed. *Kirkpatrick et al. v. Gibson*, 2 Brock. 388.¹ To hold then that the widow can receive neither legacy nor interest until the end of the

¹ Fed. Cas. No. 7,848.—Ed.

year would be to say that the richest man might die and make what he supposed an ample provision for his wife, and still she would have to starve or live upon her friends for a year or more, in consequence of an executor seeking to weave a web of technicalities around her husband's estate. *Such is not the law.* It is ordered that the executor within ten days from this date, pay to the petitioner \$1,500 upon her executing the usual refunding bond in the penal sum of \$1,500, with security to be approved by the court, without prejudice to the right of the residuary legatee, to be heard hereafter upon the question of interest, and that not less than \$4,000 of the money now in his hands be placed under the direction of the court, where it will draw interest.

(United States Circuit Court, Northern District of Illinois.)

Drake

vs.

**W. E. Rollo, Assignee of the Merchants' Insurance
Company.**

(June, 1872.)

**BANKRUPTCY—"MUTUAL DEBTS AND CREDITS"—UNMATURED DEBTS
—RIGHT TO SET OFF—JURISDICTION OF EQUITY.** Where an insurance company becomes insolvent and goes into bankruptcy owing an assured money on a loss, the latter has the right to call on a court of equity to set off against his claim, money which he has borrowed of the insurance company but is not yet due. Such a case is one of "mutual debts and credits" under section 20 of the bankruptcy act of 1867.

Bill in equity. Heard before Judges Drummond and Blodgett. The facts are stated in the opinion of the court.

Hitchcock, Beckwith, Shorey and G. W. Smith, for complainant.

Pence, Hoyne, Thompson and S. W. Fuller, for respondent.

DRUMMOND, J.:—

On the first of June, 1868, the plaintiff borrowed of the insurance company seventy-five thousand dollars, twenty-five thousand payable on the first of June, 1872, and the remainder on the first of June, 1874. Several policies were taken from the company by the plaintiff to indemnify him for loss of property by fire, amounting in all to \$17,000, and on which there was a total loss by the fire of October 9th, 1871. On the 31st of October proceedings were commenced against the company, under the act of this state to wind up insolvent insurance companies.

In November a petition in bankruptcy was filed, and on the 18th of December a decree of bankruptcy was entered against the company.

Under this state of facts, the plaintiff in April last filed a bill, claiming to set off the amount due on the policies against the debts to become due from him to the company.

And the only question in the case is, whether the set-off can be allowed. And we are of the opinion that the plaintiff is entitled to the set-off he claims. It depends upon the 20th section of the bankrupt law. That section is as follows:

“That in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not proveable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition.”

It is true in this case the plaintiff obtained part of the means which the company possessed, to meet its liabilities in case of loss or insolvency, and by permitting a set-off, it enables the plaintiff to receive payment in full of his claim, while the general creditors of the bankrupt company are only partially paid, and thus he becomes a preferred creditor. But it is a preference growing out of the business relations of the par-

ties as they stood at the time of the fire which rendered the company insolvent.

As soon as the loss happened there was the relation of debtor and creditor, and there were no special circumstances qualifying that relation. When the plaintiff complied with the conditions of the policy after the loss, and furnished his proofs, as soon as the specified time had elapsed it became a subsisting debt against the company, and, at the same time, the plaintiff was the debtor of the company for money payable in the future. It was then a case of mutual debt and credit, within the meaning of the twentieth section above cited. The parties here trusted each other, and when the plaintiff was called on to meet his indebtedness, he would have the right to retain the amount of the loss and pay the balance. The amount thus retained in one sense he does not owe, because the law seizes it in his hands if he so wills, and by its own force extinguishes the debt. And the money loaned not being due at the time the bill was filed, and constituting a mutual credit, it is competent for the plaintiff, the company being insolvent, to call on a court of equity to allow the set-off.

Kostor v. Easen, 2 Maule & Selwyn, 112; *In re Globe Ins. Co.*, 2 Edw. Chan. 625; *Osgood v. DeGroat*, 36 N. Y. 348; *Holbrook v. Receivers, etc.*, 6 Paige, 220; *Ex parte Prescott*, 1 Atk. 230; *Jones v. Robinson*, 26 Barb. 310; *Bradley v. Angel*, 3 N. Y. 475.

NOTE.—See Fed. Cas. No. 4,066.—Ed.

(Circuit Court of Cook County.)

People of the State of Illinois ex rel. John Koelling

VS.

John C. Cannon, Thomas F. Judge and Abel A. Bach, Constituting the Board of Election Commissioners of the City of Chicago, and Isaac N. Powell, Chief Clerk of said Board.

(March 24, 1908.)

1. **ELECTIONS—JURISDICTION OF LAW AND CHANCERY COURTS IN ELECTION MATTERS.** If a public officer charged with the administration of an election law refuses to obey its mandate, the party injured is not without remedy, not in a court of chancery, however, but in a court of law.
2. **PUBLIC POLICY ACT—JURISDICTION OF CIRCUIT COURT IN MATTERS ARISING THEREUNDER—DECISION OF THE ELECTION BOARD—EFFECT OF SECTION 10 AND 16 OF AUSTRALIAN BALLOT LAW.** A decision of the board of election commissioners, that a question is not a proper one to be submitted to the electorate in accordance with the provisions of the public policy act, is not a finality. Section 16 of the Australian ballot act, incorporated into the public policy act by reference merely refers to the manner of printing the ballots and section 10 of the same law gives finality only to the election commissioner's decisions in regard to nomination papers and certificates.
3. **MANDAMUS—EXISTENCE OF ANOTHER ADEQUATE REMEDY.** The fact that the petitioners may have an adequate remedy by certiorari is no defense to an action of mandamus as in Illinois the existence of another remedy is never a defense to the action of mandamus, if mandamus is proper.
4. **PUBLIC POLICY ACT—DUTY OF ELECTION COMMISSIONERS.** If the requisite number of petitioners present a "question of public policy" under the public policy act, it is clearly the duty of the election commissioners to put that question on the ballot. If the question is not one of public policy the commissioners have the right to keep it off.
5. **SAME—WHAT IS NOT A QUESTION OF PUBLIC POLICY.** A question is not one of public policy which embodies a plan of action in violation of law or against the enforcement of the law.
6. **SAME—REFUSAL OF ELECTION BOARD TO PUT QUESTION OF PUBLIC POLICY ON BALLOT—REMEDY BY MANDAMUS.** Assuming that the board has a certain amount of discretion in determining the

question of whether a proper petition has been presented to them, nevertheless they are guilty, in legal contemplation, of an abuse of that discretion, if in fact they do deny a proper petition, and mandamus will lie in such a case to compel them to submit the question.

7. **SAME—THE QUESTION IN THIS CASE.** The question: "Shall all places where liquor is sold or given away in this city upon Sunday be closed upon that day?" is a proper one to be submitted to the voters, under the public policy act, as it cannot by any reasonable construction be held to embody a plan of action in violation of law as contended.

Petition for *mandamus*. Heard before Judge Charles M. Walker. The facts are stated by the court.

Levy Mayer and *Harry Rubens*, for petitioner.

Walter L. Fisher and *Frank D. Ayers*, for respondents.

STATEMENT.

This is a petition in the name of the people of the state of Illinois on the relation of John Koelling, for a writ of *mandamus* against John C. Cannon, Thomas F. Judge and Abel A. Bach, constituting the Board of Election Commissioners of the city of Chicago in said county, and Isaac N. Powell, the clerk of said board, respondents, praying that a writ of *mandamus* issue, directed to them, commanding them to place before the voters of said city of Chicago in the manner provided by law, upon a separate ballot at the ensuing city election to be held in said city of Chicago on Tuesday, April 7, 1908, the following question:

"Shall all places where liquor is sold or given away in this city upon Sunday be closed upon that day?"

The petition sets forth that February 7, 1908, the said relator delivered to said respondents and filed with them and on said date received their receipt therefor, a petition in words and figures as follows:

"Chicago, Ills., January 31, 1908.

To the Board of Election Commissioners of the City of Chicago.

Gentlemen:—We, the undersigned, legal and registered

voters of and residing in the city of Chicago, Cook county, Ill., hereby specifically petition you to place before the voters of said city in manner provided by law upon separate ballot at the ensuing city election to be held Tuesday, April 7, 1908, the following question:

“Shall all places where liquor is sold or given away in this city upon Sunday be closed upon that day?”

That said petition was at the time of its filing, as aforesaid, and still is signed by 174,146 legal and registered voters of and residing in said city of Chicago, constituting more than 48 per cent of the total registered voters of said city; that the relator was upon said date and still is a legal and registered voter of said city and that he signed said petition before it was filed and that his signature is still attached thereto. That March 11, 1908, said Cannon, Judge and Bach, being the board of election commissioners as aforesaid, by a vote of two to one, said Cannon and Bach voting in the affirmative, and said Judge in the negative, entered of record an order refusing said petition and declining and refusing to place before the voters of said city in manner provided by law upon a separate ballot at said ensuing election the question contained in said petition: “Shall all places where liquor is sold or given away in this city upon Sunday be closed upon that day?” and still refuse to place said question before the voters of said city at said election to be held as aforesaid.

That said action and conduct of said board of election commissioners is a violation of law and contrary to their legal duty and oath of office and by means thereof the said registered voters who have signed said petition, including the relator, are prevented from having submitted to and placed before the voters of said city in manner provided by law the said question at said election to be held as aforesaid which question said registered voters, including the relator, are justly and lawfully entitled to have submitted to the voters of said city in the manner and at the time as set forth in said petition, and which question calls for the consideration

of an opinion on a question of public policy at a general election in the manner and form as prescribed by the statutes of the state of Illinois. The respondents have demurred to said petition and the cause came on to be heard upon their demurrer.

OPINION.

WALKER, J.:—

In support of the demurrer, the respondents first took the broad ground that the election commissioners, in matters of this kind, were subject to no judicial authority whatever, either in law or chancery, citing several cases supporting their contention so far as the jurisdiction of a court of chancery is concerned. There is no question that chancery being concerned only with property and civil rights lacks jurisdiction in matters involving rights purely political. But in a recent case, reaffirming this principle, the supreme court of this state said:

"If a public officer charged with political administration has disobeyed or threatened to disobey the mandate of the law, whether in respect to calling or conducting an election, or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy is in a court of law, and not in a court of chancery." *People v. Barrett*, 203 Ill. 99, 105, quoting *Fletcher v. Tuttle*, 151 Ill. 41.

Mandamus is a law action, and this court sits as a court of law in hearing it. Therefore, if petitioners have a remedy in this proceeding, it is properly here.

Counsel, however, contend that by the statute known as the Australian Ballot Law, passed in 1891 (Laws 1891, p. 107), the remedy at law is ousted and final jurisdiction over the question involved in this case vested in the election commissioners, by virtue of sections 10 and 16 of said statute;"

Section 6 of the statute relates to "nomination papers;"

Section 7 to "certificates to be filed;"

Section 10, so far as it is said to apply here, is as follows:

"Sec. 10. The certificates of nomination and nomination

papers being so filed and being in apparent conformity with the provisions of this act, shall be deemed to be valid unless objection thereto is duly made in writing. Such objections or other questions arising in relation thereto in the case of nomination of state officers shall be considered by the secretary of state and the auditor and attorney general and the decision of the majority of these officers shall be final. * * * In any case where such objection is made, notice shall forthwith be given to the candidates affected thereby addressed to their places of residence as given in the nomination papers and stating the time and place when and where such objections will be considered; provided, that in cities, towns, or villages having a board of election commissioners such questions shall be considered by such board and its decision shall be final."

Section 16, also passed in 1891 (as amended in 1899), is as follows:

"Sec. 16. Whenever a constitutional amendment or other public measure is proposed to be voted upon by the people, the substance of such amendment or other public measure shall be clearly indicated on a separate ballot, and two spaces shall be left upon the right hand margin thereof, one for the votes favoring the amendment or public measure, to be designated by the word 'Yes,' and one for votes opposing the amendment or measure, to be designated by the word 'No,' as in the form herein given." (Giving form.)

"The elector shall designate his vote by a cross mark, thus (X). The said separate ballot shall be printed on paper of sufficient size so that when folded once it shall be large enough to contain the following words, which shall be printed on the back: 'Ballot for Constitutional Amendment,' or the name of any and all public measures then to be voted on. This ballot shall be handed to the elector at the same time as the ballot containing the names of the candidates, and returned therewith by the elector to the proper officer in the manner described by this act. All provisions of this act relating to ballots shall apply to this separate ballot."

The act providing for the submission of questions of public policy to the electors was passed in 1901 (Laws of 1901, p. 198), and is as follows:

"No. 1. Be It Enacted, etc., That on a written petition signed by twenty-five per cent of the registered voters of any incorporated town, village, city, township, county or school district; or ten per cent of the registered voters of the state, it shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for, to the electors of the incorporated town, village, city, township, county, school district or state, as the case may be, at any general or special election named in the petition; provided, such petition is filed with the proper election officers in each case not less than sixty (60) days before the date of the election at which the question or questions petitioned for are to be submitted."

Not more than three propositions shall be submitted at the same election, and such proposition shall be submitted in the order of its filing.

"No. 2. Every question submitted to electors shall be printed in plain, prominent type, upon a separate ballot in form required by law, the same as a constitutional amendment or other public measure proposed to be voted upon by the people."

Counsel for respondents contend that there is no remedy at law to interfere with their decision as to what is or is not a question of public policy, and hence, whether a proposed question sufficiently signed for and filed, as required by law, should or should not be put upon the ballot; that the finality given their decisions by section 10 aforesaid in relation to "Certificates of Nomination," "Nomination Papers" and "Objections" thereto must be held to apply to and govern the Public Policy Act by virtue of section 2 of that act, and by necessary implication of law as fully as if expressly provided therein. "Necessary implication by law" means so strong a probability of an intention that a contrary intention cannot be supposed. Section 2 provides for nothing more than the printing and form of the ballot the same as a

constitutional amendment required by section 16. Section 16, after providing for the form of the ballot, says, "All provisions of this act relating to ballots shall apply to this separate ballot." Therefore, and therefrom, a "necessary implication of law," is sought to be deduced that section 10 relating to nomination certificates, nomination papers and objections thereto, and making the commissioners' decision final thereon, applies to the public policy act and makes their decision final as to whether a question, as a question of public policy, is proper to be put upon the ballot or not.

It may be noted that section 6 and 7 refer to "nomination papers" and "certificates of nomination," and that section 10 following is limited in terms to them and particularizes them and the "objections" to them and nothing more as the questions upon which the decision of the board shall be final. I am unable to perceive how or why it can give the board the final decision as to what is or is not a constitutional amendment, or what is or is not a question of public policy, simply because the law relating to these matters contains provisions prescribing the form and printing of the ballots and make the other provisions of the law "relating to ballots" merely, apply. Section 10 has nothing to do with ballots. It seems plain that it is a special provision covering the special objects named and cannot come under the principle that "whenever the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law and implication." There are other provisions which in my opinion cannot permit the public policy act to be reconciled as subject to the terms of section 10, among them the giving of notice required upon objection filed. Under section 10, when objection is made, the board is required to give notice to the parties affected, addressed to their places of residence as stated, notifying them of the time and place of hearing.

Hence one objection might require the absurdity of sending notices as in this case to 174,000 petitioners, for they are the parties and the only parties here affected.

While these reasons seem to me sufficient answer to meet

the contention of counsel that the election commissioners have the final decision whether a question properly is a question of public policy or not and whether they will submit it to the people or not. In my opinion a better and the true answer is this: That the legislature, for good reason, hereinafter stated deliberately, meant that they should not have such power, and therefore intentionally withheld it.

The doctrine of implications does not go to the extent of supplying things which were intentionally omitted by the legislature.

In view of the multitude of political offices to be filled and the frequent attendant strife, there may be sound policy, good reason and common sense in having final decisions upon contested nominations by a board of election commissioners at the earliest possible moment, but there can be no good reason, policy or sense in committing to such a board absolutely final decision upon a question directly affecting one of the fundamental principles of government, the constitutional right of the people "to make known their opinions to their representatives." Const. sec. 17, art. II. Bill of Rights, and the Public Policy Act, is a formalized and enacted method of making the people's opinions known.

Such absolute and unconditional finality of decision vested in such a board, so far as the point in question is concerned, would place the board above the supreme court of the state, make the commissioners final interpreters and arbiters of the constitution itself, and render it possible for an unscrupulous board to permit only such question of constitutional amendment—public policy and public measures—to be submitted to the people as it might approve, or, indeed, to withhold them from the people altogether and throttle their voice at will.

That is why I say that the legislature surely never intended that such should be the law. A contrary holding is too preposterous to be suggested, much less to be endured.

Respondents contend that if there is a remedy the proper one is by way of "certiorari." This is not a proceeding for a writ of certiorari, nor is the court concerned whether cer-

tiorari would or would not be a better remedy. The statute provides:

"The proceedings for a writ of *mandamus* shall not be dismissed nor the writ denied because the petitioner may have another specific legal remedy, where such writ will afford a proper and sufficient remedy." 2 Starr & Curtis, Rev. Stat. ch. 87, sec. 9.

The question then is: Does *mandamus* lie? It does, if the petitioners show that they have a clear legal right to have the thing done which they ask to be done and that it is the clear legal duty of the respondents to do it.

In other words, if the petitioners presented to the board of election commissioners a "question of public policy" under the public policy act, as alleged in the petition it is clearly the duty of the board to put that question upon the ballot. If not, the board did right in refusing the petition.

The form of the question petitioned to be submitted is: "Shall all places where liquor is sold or given away in this city upon Sunday be closed upon that day?"

The majority commissioners correctly say, in their decision attached to the petition as an exhibit, that the intent of the public policy statute "is to procure an expression of public sentiment upon some policy of government for the purpose of bringing about through the proper channel, either the enactment of a new law or the repeal, modification or amendment of one already upon the statute books;" they further say: "That there is now in full force and effect in this state a statute prohibiting all such places remaining open Sundays;" that a negative vote on the question "would mean that the voters had declared that the saloons should remain open *regardless of the law*;" that the question proposed "is *not* whether the law should be *repealed*; it is not whether the law should permit saloons to remain open on Sundays; but it is whether a law, now in force shall or shall not be obeyed."

I again agree with the commissioners when they hold as they do that "a question cannot be one of public policy which embodies a plan of action in violation of law;" or

“against the enforcement of the law.” They also hold that the proposed question does so embody such plan of action and deny the petition for that reason.

On the other hand, the petitioners contend that the question clearly is one of public policy as above defined by the commissioners themselves, and can by no reasonable construction, in all the circumstances, be construed to be anything else; and, therefore, it is entitled to be put upon the ballot. Upon the correct determination of this issue, depends the petitioners’ right to the writ.

The petitioners in argument contend that in construing their motives, as the commissioners did, they took no consideration of many well known local conditions; the fight for the constitutional amendment providing for a charter to give Chicago home rule, the new charter itself and its passage by the legislature giving Chicago home rule in all matters of domestic concern, but one, expressly withholding it from the city so far as the question of Sunday opening or closing was concerned; and the overwhelming defeat of the charter due in most part, it is claimed, to that fact. The petitioners urge their right to an expression of the sentiment of the community as to whether this city is in favor of an open Sunday or a closed one for the purpose of indicating their desire to their representatives in the next legislature, so that they may have the benefit of such expression at its next session, and give the people home rule on this question if they express a desire to have it; that petitioners’ agitation for and intention to seek such legislature were and are matters of common knowledge in the community and well known to said commissioners; that all these considerations deliberately have been ignored by said commissioners who have gone out of their way to put a forced, wrong, and in the circumstances, wholly unreasonable construction upon the proposed question, neither in any way expressed therein nor reasonably to be inferred therefrom and upon that construction have declared the question to be not a question of public policy at all.

It is conceded that if the question presented was not a question of public policy the petition was properly refused.

If it did present a question of public policy, the board had no right to deny it.

Assuming, as contended, that the board had a certain amount of discretion in determining the question, nevertheless if in doing so it has refused a petition which does present a question of public policy, it is in contemplation of law guilty of an abuse of that discretion. That *mandamus* will lie in such case is not denied and needs no citation of authorities.

The construction put by the board upon the proposed question is hereinbefore stated.

It must be and indeed is admitted that the question in itself and standing alone without reference to the existing statute is properly a question of public policy.

Respondents' counsel say that probably it would have been ordered on the ballot but for the contentions of the objectors who appeared against it and whose objections were considered.

The law does not contain any provisions for the filing or hearing of objections to proposed questions of this kind, public measures or constitutional amendments. However, in a proper case, I see no reason why objectors may not appear before the board as *amici curiae*, so to speak, and make known their objections to aid it in keeping free from error; and it is within the power of the board to frame reasonable rules to that end.

In view of all the surrounding circumstances, the conclusion seems irresistible that the board has construed and treated this question as a purely academic proposition; without giving the 174,146 petitioners due benefit of presumptions that exist in their favor, among them the presumption of "good intent as against bad intent;" the presumption "against absurdity," which merely means the presumption in favor of ordinary common sense; the presumption "against doing a vain or useless thing," which in this case would be

planning action for the nonenforcement of a law, which, as everybody knows, is not enforced now; and also without looking at the question in the light of contemporary local history and conditions above referred to, unless as against all this it still can be said that the question embodies a "plan of action in violation of law."

If it can be pointed out that a negative vote upon the question would embody or result in any "plan of action" in violation of law or against its enforcement which could not be fully as well undertaken or could not be quite as lawfully and effectively met and dealt with by the law and the civil authorities after such vote as before, the objection might be held to be good and well taken.

Let us assume that the vote has been taken, that it is negative, that is, against closing all places where liquor is sold or given away on Sunday. What is the result? So far as the law or the enforcement of the law is concerned, how is the situation changed in the slightest degree? What "plan of action" is the community left to encounter? The law remains precisely the same; precisely the same officers of the law remain under precisely the same oaths and obligations and with the same powers to enforce it and under precisely the same penalties as before for not enforcing it.

When this question was asked at the hearing, counsel for respondents frankly admitted that in respect of the things mentioned there would be no change, the situation would remain the same.

What then is the net result of the vote but a mere expression of opinion upon the question of the public policy as to Sunday opening or Sunday closing?

Respondents' only answer is that such vote might be misconstrued by the lawless and leave room for argument on their part that it meant a declaration in favor of non-enforcement of the law.

The reason,—the mere possibility of an aftermath argument, even if sound—is not of sufficient force to disfranchise the people and deprive them of their constitutional and legal

right to an expression of their opinion. The reason however, is not only not sound, but is destructive of itself; because a complete answer to the argument suggested would be the decision of a court of competent jurisdiction to the contrary; this court now holding as it does that the question does not embody and cannot by any reasonable construction be held to embody any plan of action in violation of law or declaration for its non-enforcement.

For the reasons stated, the court further holds that the question proposed clearly is a question of public policy, not academic merely, but of vital interest to the whole community, that the petitioners have a clear legal right to have it put upon the ballot and that it is the clear legal duty of the board of election commissioners to put it there.

Therefore, the order of the court will be that the demurrer is overruled and that the writ of *mandamus* issue, as prayed.

(*Supreme Court of Illinois.*)

People of the State of Illinois ex rel. John Koelling

VS.

John C. Cannon, Thomas F. Judge and Abel A. Bach, Constituting the Board of Election Commissioners of the City of Chicago and Isaac N. Powell, Chief Clerk of said Board.

(March 31, 1908.)

1. **MANDAMUS—NATURE OF REMEDY UNDER ILLINOIS STATUTES.** Under the Illinois statutes, mandamus is no longer a prerogative but is nothing more than an ordinary action at law where it is the appropriate remedy.
2. **APPEAL—PERFECTION OF—STAY OF PROCEEDING—NECESSITY OF BOND.** Where a bond is required in order to perfect an appeal, the proceedings in the lower court are not stayed until the bond is filed. The filing of a bond is a necessary part of the procedure in perfecting an appeal.
3. **APPEAL—PERFECTION OF UNDER SECTION 98 OF PRACTICE ACT—NECESSITY OF BOND—STAY OF PROCEEDINGS.** Where appellant is

of the class mentioned in section 98 of the practice act, the giving of a bond is not essential to perfect his appeal and the proceedings are stayed without him giving the same.

4. **MANDAMUS—GRANTING OF WRIT—EFFECT OF APPEAL.** Where a writ of mandamus has been granted, the perfection of an appeal suspends the force of the judgment the same as in any ordinary action at law and stays all proceedings until the appeal is decided.

Motion, appellants (respondents below) for a supersedeas. Heard before Judge Orrin N. Carter, of the Supreme Court in chambers at Chicago. The facts are stated in the opinion.

Walter L. Fisher and *Frank D. Ayers*, for appellants (respondents below).

Levy Mayer and *Harry Rubens*, for appellee (petitioner below).

CARTER, J.:—

A petition was filed in the circuit court of Cook county to compel the election commissioners to print a certain question on the ballot for the coming April election. After a hearing the court granted the prayer of the petition, and from that decision an appeal has been perfected to the supreme court of the state. The respondents have presented a motion that a writ of supersedeas be issued on this appeal under section 98 of the Practice Act.

At the threshold I am met with the question whether the perfecting of the appeal operates as a stay of the proceedings in the lower court. If it does, then it is unnecessary to hear the other questions involved, for no matter what action I might finally take on the question of the supersedeas, all parties would not be legally bound to follow the finding. Generally speaking, it is unwise for any court to attempt to decide a moot question.

I have given the subject as to whether the appeal in this case operates as a stay as thorough and careful an examination as the limited time would permit.

Section 10 of chapter 87, Hurd's Statutes, 1905, p. 1351, states that appeals and writs of error in *mandamus* are taken

and prosecuted in the same manner, upon the same terms and with like effect as in other civil cases. Since this statute was enacted it has been frequently decided that the writ of *mandamus* is not now, as formerly, a prerogative writ, but under the statute it is nothing more than an ordinary action at law in cases where it is the appropriate remedy, and that it is governed by the same rules of pleading as are applicable to any other actions at law. *People v. Weber*, 86 Ill. 283; *Dement v. Rohker*, 126 Ill. 174; *People v. Crabb*, 156 Ill. 155; *People v. City of Chicago*, 193 Ill. 507; *People v. Board of Trade*, 193 Ill. 577.

The better considered doctrine now is that the writ in the United States has lost its prerogative aspect, and is to be regarded much in the nature of an ordinary action between the parties, and as a writ of right to the extent to which the party agreed shows himself entitled to this particular species of relief. High on Extraordinary Legal Remedies, 3rd ed. sec. 4.

"It is equally well settled," said Chief Justice Taney, of the United States supreme court in *Commonwealth v. Dennison*, 24 Howard, 66, 97, "that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable."

To the same effect is Merrill on *Mandamus*, sec. 309; 2 Spelling on Extraordinary Remedies, 2nd ed., par. 1713; Elliott on Appellate Procedure, sec. 394.

The hurried examination I have been able to give the authorities cited by these text writers leads me to believe that the general trend of decisions by the various state courts of last resort in this country, especially where the statute is anything like our own, is substantially to the same effect.

Where the lower court, under the statute and by an order requires a bond to be filed in order to perfect an appeal to the supreme or appellate court, the proceedings in the lower court will not be stayed until the bond has been filed. *Simpson v. Alexander*, 10 Ill. 260; *Blackerby v. People*, 10 Ill. 266; *Reynolds v. Perry*, 11 Ill. 534.

But the reasoning of those decisions is all to the effect that the filing of the appeal bond is a necessary part of the procedure in perfecting the appeal.

In this proceeding it seems to be admitted that under sec. 98 of the Practice Act respondents are not required to file a bond. *Holmes v. City of Mattoon*, 111 Ill. 27.

They have taken all the steps required of them by law to perfect the appeal.

In *Cowan v. Curran*, 216 Ill. 598, the court said, page 623: "When an appeal is perfected, the jurisdiction and control of the court below cease, and the appeal becomes a stay of all proceedings to enforce the execution of the judgment or decree."

To the same effect is *Oakes v. Williams*, 107 Ill. 154; *Shirk v. Gravel Road Co.*, 110 Ill. 661; *Smith v. Chytraus*, 152 Ill. 664.

- See also on this subject *Perteet v. People*, 70 Ill. 171.

Unless *mandamus* is different from an ordinary law proceeding in this state, then under these authorities it seems quite evident that the appeal must act as a stay of the proceedings in the trial court.

In discussing whether an appeal from a writ of injunction has the effect of suspending the writ pending the appeal, it is stated in *High on Injunctions*, 4th, ed., sec. 1693a that in prohibitory injunctions the court which granted the writ has the power, pending the appeal to punish for its violation, but that this is true only in that class of injunctions; but where the decree appealed from grants a mandatory injunction or one which, although prohibitory in form, is mandatory in substance, the rule is equally as well established that the perfecting of an appeal from the final decree

will have the effect of suspending the operation of the injunction during the pendency of the appeal, and in such case the court is without jurisdiction to punish the defendant against whom the injunction runs for failure to perform the acts required by the writ.

In discussing this same question in *Barnes v. Chicago Typographical Union*, 232 Ill. 402, it is stated: "There are judgments and decrees which require something to be done for their enforcement and there are others which are simply prohibitory or self-executing, and others partake of the nature of both. A prohibitory decree which does not require anything to be done is self-executing. It requires no process, but by force of the decree itself the party is bound to desist from the prohibited act. If an injunction is of a mandatory character, requiring something to be done, or if negative in terms but with the same effect, a proceeding for contempt in refusing to obey it is in the nature of an execution to enforce the command."

An appeal would stay any such proceeding, while it would have no such effect with respect to the power of the court to compel obedience to a self executing decree. *Mandamus* is very similar in effect to a mandatory injunction, one being a common law and the other a chancery proceeding. 26 Am. & Eng. Ency. 143 and cases cited.

The writ of *mandamus* in this case is not self executing. It requires the issuing and serving of process in execution of the judgment. Manifestly, under section 10 of our statute on *mandamus*, and the decisions heretofore cited, a *mandamus* proceeding is an ordinary action at law and is subject to review on writ of error or appeal as any other case. High on Extraordinary Legal Remedies, 3rd ed., sec. 4. 2 Spelling on Extraordinary Legal Remedies, 2nd ed., 1713.

Section 98 of the Practice Act is not in conflict with this conclusion.

I appreciate the grave importance of the questions involved in this proceeding. These controverted questions ought to be settled in such a manner that all interested, and

that means the entire community, would accept the settlement as final, not only for this election, but also for all actions in the future elections.

If the appeal in this case acts as a supersedeas, it would not be appropriate here to consider and decide what counsel have termed the merits of the question. If the appeal so operates, then the evils that counsel insist must grow out of the delay caused thereby, are questions that should be addressed to the legislature, and not to the courts. It is the duty of the judiciary to construe the law as they find it, and no public reason, however important, can justify a court in failing to follow the plain provisions of the law. If any other rule were to obtain, it would soon cause the construing of laws and the enforcement of judgments to be within the mere discretion of the judges. The rights and liberties of citizens cannot be made to depend for their security on the arbitrary will of any public official—and least of all the judiciary.

As Justice Story, of the United States supreme court said, in *United States v. Dickson*, 15 Pet. 141, 162: "It is not to be forgotten, that ours is a government of laws, and not of men; and that the Judicial Department has imposed upon it, by the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be * * * it is not at liberty to surrender, or to waive it."

The evils that may arise from my undertaking to settle this subject on the merits, as a moot question, would be far greater than any that can arise from following what I believe to be the law.

The appeal in this case having been perfected, operates, in my judgment, as a supersedeas, and stays all proceedings until the appeal is decided.

In view of what has been said, any further action on my part would be futile and without justification.

(Circuit Court of Cook County.)

People ex rel. Fitzpatrick and Cruice

vs.

John C. Cannon, Abel A. Bach, and Thomas F. Judge, Election Commissioners of the City of Chicago.

(March 23, 1907.)

1. PUBLIC POLICY ACT—REFUSAL OF ELECTION COMMISSIONERS TO COMPLY WITH PETITION THEREUNDER—REMEDY BY MANDAMUS—JURISDICTION OF CIRCUIT COURT. If the election commissioners arbitrarily in disregard of the provisions of the public policy law refuse to place a proper question signed by the requisite number of electors, upon the ballot, the circuit court has jurisdiction to compel them by mandamus to discharge their duty in that respect.
2. STATUTES—CONSTRUCTION OF, WHERE MEANING CLEAR—DUTY OF COURT. It is an elementary rule of construction to first look at the language of an enactment, and if, from the words used, the meaning is clear and plain, it is the duty of the court to declare the meaning of the law to be as the words indicate. In such a case, there is strictly no need for construction.
3. PUBLIC POLICY ACT—NUMBER OF PROPOSITIONS TO BE SUBMITTED—ORDER OF PRECEDENCE. The public policy law provides that but three questions may be submitted at any one election. Any number of petitions may be filed with the board of election commissioners, but only the first three in order of their *filing* can be submitted to the electors.
4. PUBLIC POLICY ACT—APPEARANCE OF MORE THAN ONE QUESTION ON ANY ONE PETITION. Under the public policy statute, while three questions may be submitted at one election, but one question can appear on any one petition. If a petition contains more than one question to be submitted, the whole is a nullity.

Petition for writ of *mandamus*. Heard before Judge Richard S. Tuthill. The facts are stated in the opinion of the court.

Addison Blakely, for petitioners.

Frank D. Ayers, for respondents.

TUTHILL, J.:—

The question I am called upon to decide in this case arises as to the proper construction of what is commonly known as the "public policy" law of the state enacted by the general

assembly, and approved May 11, 1901. (Hurd's Revised Statutes, 1905, page 967.)

The petition alleges that pursuant to this statute petitioners and many thousands (the required number) of other citizens of Chicago signed: "A certain petition known as the Emergency Referendum Petition a copy of which is attached to and made a part of the petition in which petition three questions are asked to be submitted, which are as follows:

First: "For the approval of ordinances substantially in the form of the pending ordinance (reported to the city council of the city of Chicago, on January 15, A. D. 1907) authorizing the Chicago City Railway Company and the Chicago Railways Company, respectively, to construct, maintain and operate street railways in said city, and providing for the purchase thereof by the said city or its licensee."

Second: "Shall the city council proceed by condemnation under the Mueller law to acquire and equip a complete, modern, unified street railway system with one fare and universal transfers for the entire city, instead of passing the pending franchise ordinance?"

Third: "Shall the legislature repeal the Sunday closing laws which forbid under penalty attending or taking part in amusements or diversions, maintaining open bars, and engaging in business or work on Sunday?"

It is alleged and conceded for the purpose of this hearing, at least, that the requisite number of signatures of electors are attached to said petition to require the submission of a question to the voters for their decision. It is further alleged that when this petition was presented to John C. Cannon, Thomas F. Judge and Abel A. Bach, election commissioners, they and each of them refused and still refuse to print said three propositions, or either or any of them upon the ballot at the election, April 2, 1907, "in accordance with the tenor of said petition, and in pursuance of the duty imposed upon them specifically by the provisions of said public policy act, which said refusal is incorporated in an opinion by said commissioners rendered by them on the 21st day of February, 1907, a copy of

which is attached hereto and marked Exhibit B. to which formal exception and protest was then and there made by attorneys for these petitioners."

The writ of *mandamus* is herein prayed to compel the placing of said above-mentioned three questions contained in said petitions upon the ballot by said election commissioners.

If the election commissioners have arbitrarily, in disregard for the provisions of the law, refused to place said propositions upon the ballot, then I am of the opinion that this court ought to issue its writ of *mandamus* to compel them to discharge the duty which the statute imposes upon them in this respect. Was the petition a valid and legal petition? This involves this other question: Does the law permit more than one question to be signed for by petitioners upon one and the same petition?

An elementary rule of construction is first to look to the language of an enactment, and if, from the words used, the meaning is clear and plain, it is the duty of the court to declare the meaning of the law to be as the words used indicate. In such case it is not needed to go further in citing other rules of construction, for there is no need of construction. This law declares that "on a written petition signed" etc., "it shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for" to the electors, etc. "Provided, such petition is filed with the proper election officers in each case not less than sixty days before the date of the election at which the question or questions petitioned for are to be submitted. Not more than three propositions shall be submitted at the same election, and such proposition shall be submitted in the order of its filing."

The right secured in the organic law, section 17, article II, Bill of Rights, to the people "to make known their opinions to their representatives and to apply for redress of grievances," will in no way be denied or frittered away by technical and subtle reasoning. At the same time it was most proper for the representatives of the people in the legislative body to provide an orderly and appropriate method whereby the opinions of the people might be definitely and clearly made known to their

representatives, so that frauds upon the people themselves might not be made easy or possible of perpetration. It was most necessary and proper to guard the exercise of this important right of the people so that the people should not themselves be deceived or misled and made to seem to ask for that which they did not in fact intend or desire. In order to enable the voter to express his wish, the issue presented to him should, so far as is practicable, be segregated from others, for it is only possible for him to give an affirmative or negative answer, "Yes" or "No", and by a cross opposite the question he is to answer by his vote to signify his wish. In order that the voter should not be confused and thus fail to express his real wish, the legislature wisely limited the number of questions which might be submitted at any election to three, and by requiring the petitions to be signed by 25 per cent. of the registered voters.

But these are not the only things which are required. All the words of a statute are to be considered and given weight in determining the scope and meaning of the law. The three questions to be submitted are, I may state, distinct and may be, usually are, incongruous. There is no limit to the number of petitions which may be presented to the election commissioners and *filed*. Any one interested may present a proposition, and if it has the required signatures, he may present it for "filing." When the time within which petitions may be submitted has expired, then the duty of the commissioners is to consider:

First. *The order of the filing of the petitions according to the dates when presented; for the law declares that, "such" (each) "proposition shall be submitted in the order of its filing."*

It is argued that the provisions of the law will be complied with if the "propositions" are submitted in the order in which they are placed on the petitions. But this is not what the law says. The "filing" is the fact which the law declares as fixing the order of submission, and neither the commissioners or even the court has a right to declare "that any other fact shall be considered in order to determine the order of the submission of the three propositions."

It seems to me that this consideration is conclusive of the contention in this case, namely: that only one proposition can be presented in one and the same petition. A consideration of other words in the law, however, sustains this view. It is declared to be the duty of the election officers "in *each* case to submit *any question*." Had the legislature intended that an unlimited number of questions, or that more than one question could be petitioned for in one and the same petition, why did they say "any question," using the singular number, rather than the plural, questions? The mention of one is the exclusion of the other.

It is ingeniously argued that the use of the words "question" or "questions" in the proviso indicated that more than one question might be petitioned for in one and the same petition, but I am wholly unable to take this view. It is true the law permits the submission of three questions by the election commissioners. There might be only one question and only one petition to submit, and therefore it was necessary in case there was more than one question, and more than one petition, to make the requirements found in the proviso apply to all as well as to each, to "questions petitioned for" as well as to "a question petitioned for."

The petitions on which are found the three propositions which it is sought to have placed on the ballot well illustrate the danger and evil which the legislature sought to avoid, as it appears to me, by requiring that only one proposition should be submitted in any one petition. The voter might wish to vote for one of these propositions, but might, and in many cases certainly would, wish to vote against another. Again his interest in one might be so great that in order to promote that he would even sign a petition containing another which he was in truth opposed to, or when his signature was requested, his attention only be called to the proposition he approved, and the one he did not approve would be kept in the background. Thus a vicious and hurtful practice, known in legislative bodies as log rolling, would inevitably be resorted to. So, instead of a petition truly representing the wishes of the signers and making known their opinions to their representatives, it would in very many cases have an opposite ef-

fect, and thus tend to defeat the only legitimate and proper object of the public policy law.

The language of the law seeming to be clear and conclusive as to the legislative intent, it is perhaps not needed that I should discuss or refer to authorities bearing upon the contentions of the learned counsel on each side of this case. The case of *Supervisors of Fulton County v. The Mississippi & Wabash Railroad Co.*, 31 Ill. 338, 373, is so much in point and so clearly expresses my own views as to the questions herein involved, and which ought to and no doubt did influence the legislature in the enactment of this law, that I will close by quoting from the opinion of Justice Breese, one of the first and ablest judges who, on the bench of the Supreme Court, has declared the law in our state, and given reasons therefor which have been approved by jurists, statesmen and patriots as based upon good morals, sound reasoning, a profound regard for the welfare of the people, and the perpetuity of a government by the people. He said:

"The order made by the Board of Supervisors of Fulton county under this law, does not seem to be in strict conformity to it. The law evidently contemplates a vote for or against subscription, to some one company, only, specifying the company. The order is for a subscription to the Mississippi and Wabash River Railroad Company, and the Petersburg and Springfield Railroad Company, seventy-five thousand dollars to each.

"This is not only not pursuant to the law, but is manifestly unfair. All elections, as well for measures as men, should be perfectly free, uninfluenced by any consideration, other than the merits of the individual man or measure proposed. We boast of the freedom of the elective franchise, should we not strive to swell the boast by its purity also? A single, isolated measure, such as a railroad, may not unite a majority of a county to whom it is proposed. It may favor, if constructed one portion of a county more than another, and thereby be prevented from receiving a clear majority vote, such as the law clearly contemplates shall be given. Is it fair, in order to accomplish this object, to attach another measure to it, to

be voted on at the same time, which may benefit the opposing portion of the county? The law never intended that two roads should be coupled together, and the people forbidden to vote for the one if they did not also vote for the other, the one road being really a bribe offered for votes for the other. The truth is the voters of Fulton have never had an opportunity to vote, and never have voted this subscription, for the question was at no time distinctly before them. The question before them was, will you vote for a subscription to two roads? Neither road has received the approving vote of the people, and until that is done, until the naked single question shall be fairly presented to those voters, they ought not to be bound, or injuriously affected, by any such jockeying management and log rolling. By this system, condemned as it has always been, by the moral sense as well as sense of justice, of the whole country, it should at this day find no favor in the courts. We do not hesitate to say, this proposition to vote on two roads at the same time, was not authorized by the law, and is a fraud on the people.

"This tacking one measure upon another is unjust in another view, as it gives the county court power to weigh down a popular single measure, by attaching odious measures to it, and this virtually depriving the people of their right to vote on the one measure the success of which would greatly promote their interests.

"Such maneuvering should be condemned everywhere as unfair and unjust, and we so regard it. The order made by the board of supervisors, in thus obtaining the vote of the people, is considered as unauthorized by the act.

"The decree of the circuit court is reversed."

The language of the supreme court of Colorado, in *Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311, is also directly in point.

The order of the court will be that the writ of *mandamus* prayed for in this petition is denied.

(Circuit Court of Cook County. In Chancery.)

The Union Pressed Brick Co.

vs.

Chicago Hydraulic Pressed Brick Co., et al.

(July 29, 1899.)

1. **CONTRACTS—RESTRAINT OF TRADE—VALIDITY OF AGREEMENTS TO SELL TO CERTAIN PERSONS ONLY.** An individual or corporation, may enter into a contract to sell its property, merchandise, or its labor to certain persons and none others. Individuals or corporations have the right to refuse to contract with other individuals or corporations. But in so contracting or refusing to contract they must not commit a criminal offense.
2. **CONTRACTS IN RESTRAINT OF TRADE—PROHIBITION OF BY STATUTE.** Where the legislature has seen fit to abridge the right of contracting, and declare that certain contracts are criminal offenses, then such contracts and combinations are without the pale of the law and will not be sustained and carried out by the courts.
3. **INJUNCTION TO RESTRAIN A CRIMINAL OFFENSE.** As a broad proposition an injunction will not lie to prevent the commission of a criminal offense, but if the commission of a crime against the State will result in damage to the property of an individual, an injunction will lie to prevent such injury if the remedy at law is inadequate. Where the commission of crime will entail property loss to a private citizen for which he has no adequate relief at common law, courts of equity should give redress to the person who has been made to suffer such irreparable injury.
4. **COMBINATIONS AND MONOPOLIES IN RESTRAINT OF TRADE—AGREEMENTS TO CONTROL PRICE OF BRICK.** Where certain brick manufacturers, entered into an agreement with a masons' and builders' association, which comprised practically all the persons engaged in brick and mason work in Chicago and Cook County, Illinois, under which the members of the association were bound to purchase all brick used by them from said manufacturers, the price being increased and the additional profits paid into a pool to be divided pro rata among the brick manufacturers, and the association; *held* that this constituted a conspiracy and combination in violation of the anti-trust acts of Illinois.

Bill for injunction to restrain an unlawful combination in restraint of trade. Circuit court of Cook County, Gen. No.

196,935. Heard on bill and affidavits in support thereof, and demurrer to bill, before Judge Edward F. Dunne.

The facts are stated in the opinion.

Newman, Northrup & Levinson, solicitor for complainant.

Darrow, Thomas & Thompson, Henry M. Matthews, and Gott & Robinson, solicitors for defendants.

DUNNE, J.:—

The complainant in the case at bar has filed a bill for injunction, the salient allegations of which are as follows:

That it is a corporation engaged in the manufacture and sale of pressed and sewer brick; that it has fully one hundred thousand dollars (\$100,000.00) invested in its business; that in the year 1898 it sold 2,300,000 pressed brick in the county of Cook and realized many thousand dollars profits therefrom; that during the month of April, 1899, it sold in said county over 750,000 brick, and during the first eight days of May about 400,000; that on the 9th day of May, 1899, the defendants entered into a conspiracy, hereinafter set forth, as a result of which its sales of brick during the months of May and June amounted to only about \$25,000; that including the complainant there are six firms and corporations engaged in the business of selling pressed brick in the city of Chicago and county of Cook; that up to May 9th, 1899, the complainant was selling such brick at from ten to eighteen dollars per thousand on the Chicago market; and that all of said other companies were selling the same character of brick for higher prices than the prices at which complainant was selling said brick, which were fair and reasonable and yielded to complainant a fair, reasonable and satisfactory profit; that the demand for complainant's brick was very large and steadily increasing from April 1st, 1899, down to May 9th, 1899; that the defendant, the Chicago Masons' and Builders' Association, is an incorporated company; that it contains among its members at least two-thirds of all the persons and firms and corporations in the city of Chicago and in the county of Cook engaged in the business of constructing brick and mason work, and practically all of the substantial and reliable

persons, firms and corporations engaged in that business in said city and county; that the members of said association have constructed over 95 per cent. of the brick and mason work in said county during the year 1899; that the purpose and object of said association, as stated in its Constitution and By-laws is "for the purpose of producing uniformity of action in regard to the various matters involving their mutual interest;" that said association, under article 13 of its By-laws, has created a Committee of Arbitration; that this committee, under article 13, has the right to "enter into agreements and formulate working rules binding upon this association and its members, and is empowered to enforce the same;" that said Committee of Arbitration for many months last past have had arbitrary control of the acts and conduct of the members of said association in and about and in connection with the entering and fulfillment of contracts for brick and mason work; and the power to determine from what persons, firms and corporations the members of said association shall be permitted to purchase building materials; that said committee has frequently exercised said power and authority and has enforced the same by fines and penalties. That by Rule 9 of the Working Rules, it is provided that members of said Association will employ members of the Brick-Layers Association, and none others, and that members violating any of the rules of said association shall be fined by the Arbitration Committee not less than five dollars for each offense; but that this rule shall not apply to rules where special fines are provided; that by Rule 14 of said association, any member fined shall stand suspended in all the rights and benefits of the association until his fines are paid; that there exists in the city of Chicago and county of Cook, a Mason & Brick-Layers Union, which said union comprises at least 75 per cent. of the efficient and competent journeymen, stone masons and brick-layers, in said Cook county; that said union has adopted a working rule in which it is provided that the members of said union will work for members of the Masons & Builders' Association and (with some immaterial excep-

tions) none others; that by means of the rules adopted by the Masons & Builders' Association and the Brick-Layers' Union the members thereof have secured and exercised, and do now practically exercise complete control over the entire business of constructing brick and mason work in the county of Cook; that no member of the Brick-Layers' Union will lay brick except for a member of said Mason & Builders' Association, and that as a result thereof the members of said Masons & Builders' Association have constructed over 95 per cent. of the brick and mason work during the year 1899, and have had practically the exclusive control and monopoly thereof; that four of the defendants, to-wit. The Chicago Hydraulic Pressed Brick Company; the Cayuga Pressed Brick Company; Thomas C. Moulding Company; and Charles Bonner, being manufacturers and dealers in pressed brick, have entered into a fraudulent and corrupt conspiracy between themselves and the said Masons & Builders' Association, in restraint of the sale of and trade in pressed brick and paving brick for building purposes, in the county of Cook, and to secure to themselves a sole monopoly in the sale thereof in said county of Cook at arbitrarily increased prices, the terms of which conspiracy are as follows:

That said four brick dealers would from and after May 9th, 1899, arbitrarily increase the price of all pressed brick and paving brick for building purposes, to the amount of three dollars per thousand over and above the price for which they had been selling brick hitherto, and would not sell any such brick except at said increased prices; and that of said increased price per thousand, two dollars should be paid into a fund or pool which should be held by said four conspiring brick dealers, to be divided by them pro rata, among said conspiring brick dealers, and the remaining one dollar per thousand of such increased price should be paid over to the Masons' & Builders' Association, for and in consideration of the fraudulent agreements on the part of said Masons' & Builders' Association, to buy or use, or permit to be used in said Cook county no pressed brick or paving brick for build-

ing purposes whatever, at any price whatever, except those which should be sold by said four conspiring brick dealers, or some one of them.

It is further alleged that as part of said agreement between said four conspiring brick dealers and the Masons' & Builders' Association, that they covenanted and agreed with each other, that should any member of the said Masons' & Builders' Association, use or permit to be used any pressed brick or paving brick for building purposes, other than that bought from said four conspiring brick dealers, or one of them, that then and in such case, such member should be fined by the Masons' & Builders' Association, the sum of four dollars per thousand for each thousand brick so used or purchased from others than the said four conspiring brick dealers, or one of them, and should also be punished for such action by other heavy fines and penalties, which would be imposed by said Masons' & Builders' Association, in each case, according to the arbitrary discretion of the officers of said association; that said agreement between said Masons' & Builders' Association and said four conspiring brick dealers, went into effect on or about the 9th day of May, 1899, and has ever since remained in full force and effect; that on or about said date said four conspiring brick dealers arbitrarily increased the price of pressed brick and paving brick for building purposes, to the amount of at least three dollars per thousand, for each thousand, over and above the price at which they were selling the same on May 9th, 1899; and have ever since said date sold and still continue to sell said pressed brick and paving brick at said increased price; and that by reason of said agreement and conspiracy between said four conspiring brick dealers and the Masons' & Builders' Association, said conspiring four brick dealers have ever since May 9th, 1899, been able to sell and have sold practically all the pressed brick and paving brick for building purposes that has been sold in the county of Cook, and have prevented the complainant and other dealers not in the conspiracy from selling any pressed brick or paving brick in said Cook county since May 9th, 1899; that many

of the members of said Masons' & Builders' Association are willing and anxious to purchase brick of complainant, but stand in fear of the rules, regulations, fines and penalties adopted by said association, and by reason of such fear decline to buy brick from the complainant, while some members of said association have ordered brick of the complainant but have countermanded their order, by reason of such rules, fines and penalties; that by reason of the acts and penalties of the said defendants, hereinbefore mentioned, the complainant has ever since May 9th, 1899, been wholly prevented from selling pressed brick or paving brick in Cook county, which it would have otherwise sold, and has thereby lost and been deprived of certain large profits which it would otherwise have made in the sale thereof, and that its said trade has been greatly damaged and injured and the reputation of the said brick so sold by complainant has been greatly impaired among contractors and builders and other persons; that the complainant is under an expense amounting to two thousand dollars per month for wages and salaries of its employees and that by reason of said conspiracy it is carrying on its said business at a great and constant loss, which said loss is necessarily impossible and will be necessarily impossible to demonstrate with accuracy in a suit at law, and that the damage to the complainant's business is continuous and irreparable.

Upon these allegations complainant asks the court to enjoin the defendants from further continuing said conspiracy and from directly or indirectly enforcing said pressed brick rules, and from continuing or permitting to be continued any agreement or arrangement between said Masons' & Builders' Association and said four conspiring brick dealers, which provides that all pressed or paving brick shall be purchased by members of said association from no other person or firm save and except the said four conspiring brick dealers.

The petitioner further prays for a mandatory injunction, commanding said firms and the Masons' & Builders' Association to rescind said pressed brick rules and regulations of like nature, heretofore enacted, and requiring said association to

notify the members of said Masons' & Builders' Association that said rules are rescinded and annulled, and for other relief.

The defendants have filed a general demurrer to this bill of complaint, and the complainant asks for a temporary injunction, based upon the allegations of the bill, admitted by the demurrer to be true, and the affidavits filed in support of the same.

It is contended by counsel for the defendants, that a court of chancery is not justified in granting an injunction upon the allegations of the bill; that the members of the Masons' & Builders' Association, and the four brick dealers in question, had an undoubted right to enter into the arrangement or contract set out in the bill of complaint; that any individual or corporation has the right to contract with any other individual or corporation for the purchase or sale to it or him, of its merchandise, property or labor, and that any individual or corporation has the right to refuse to contract with any other individual or corporation in the community, for the sale of its merchandise, property or labor, and that what any one individual or corporation may do a combination of individuals or corporations has the right to do, and that a court of equity should not impair the right of free contract by interfering with injunctive power for the object of preventing the carrying out of such contracts.

It is undoubtedly true that an individual or corporation may enter into a contract to sell its property, merchandise, or its labor, to certain persons and none others. It is also true that individuals or corporations have the right to refuse to contract with other individuals or corporations. But these propositions are subject to this modification: That in contracting, or refusing to contract, they do not commit a criminal offense.

Where the legislature in its wisdom, has seen fit to abridge the right of contracting and declared that certain contracts are criminal offenses, then such contracts and combinations are without the pale of the law and instead of being sus-

tained and carried out by the courts, must receive their condemnations.

The legislature of the state of Illinois doubtless having in view just such combinations as that set out in the bill in this case, passed in the year 1897 an act making criminal "a combination of capital, skill or acts, by two or more persons, firms, corporations or associations of persons, or two or more of them, for either, any, or all of the following purposes: First: to create or carry out restrictions in trade; second, to increase the price of merchandise or commodities; and third, to prevent competition in the sale or purchase of merchandise or commodities." ¹

Can it be doubted, that if the defendants in the case at bar have entered into the arrangement set out in complainant's bill of complaint, that the aim, object and natural effect of this combination would be to restrict trade; to increase the price of pressed and paving bricks; and to prevent competition in the sale thereof?

If the effect of the combination set out in the bill of complaint, is to restrict trade, to increase the price of pressed brick and paving brick, and to prevent competition in the sale thereof, it is a crime, so made by the statute of 1897, and if it be a crime it is not a contract or combination which any firms, corporations or individuals had the right to enter into.

Counsel for defendants have cited to this court numerous authorities in support of their contention that the defendants in this case had a right to enter into this contract or combination but all of these cases will be found, upon examination, to have been decided before the passage of the anti-trust law in this state, or in states and countries where no such anti-trust laws are found in the statute books; or they have been decided without the attention of the court being called to the statute in question.

¹ The anti-trust act of 1897 was held unconstitutional in *People ex rel v. Butler Street Foundry & Iron Co.*, 201 Ill. 236. See also, *People v. Richards & Kelly Mfg. Co.*, 1 Ill. C. C. 181, note; and *Taylor v. Pullman Co.*, 1 Ill. C. C. 50, note. The original act of 1891 of which the act of 1897 was an amendment is still in force.—Ed.

Counsel for the defendants further contend, that even if the combination set out in the bill of complaint, is a criminal offense, that it is punishable by the state laws, and that no individual has a right to complain thereof, except in the criminal courts of the state. And counsel argues with great force, that an injunction will not lie to prevent the commission of a criminal offense.

As a broad proposition this is undoubtedly the law. The criminal procedure of the state is or ought to be, adequate to prevent the commission of a crime, but none the less, if the commission of a crime against the state will result in damage to the property of an individual, no one will question but that the individual has the right to civil redress in the courts for the damage to his property.

If a malefactor burned down the house of a citizen, he may be punished in the criminal court for arson. None the less he may, if financially responsible, be compelled to compensate the owner of the house, in an action on the case for damages. If a citizen has the right to sue civilly a criminal who has damaged his property and recover compensation from a financially responsible criminal, by what rule of law or equity should he be denied the right to prevent by injunction the injury to his property, if the remedy at common law is inadequate?

If a lot of irresponsible men should conspire to burn down the house of a citizen and thus inflict an irreparable loss on him, must he take the chance of arresting them and proving their guilt in the criminal court, and in the meantime have his house destroyed? Or, should he not, as in every case where he can show irreparable injury, appeal to a court of chancery and by showing that such injury would be irreparable to him, obtain by injunction an order restraining them from entering upon his property for the purpose of committing such illegal act?

A court of equity ought not be permitted to enjoin crime, as crime, because it has no criminal jurisdiction and the machinery of the criminal law is supposed to be adequate to prevent the

same. But if the commission of such crime involved the loss of private property the owner thereof should and can obtain redress for his loss in a court of common law, where that relief is adequate. Where the commission of such crime will entail property loss to a private citizen for which he has no adequate relief at common law, the courts of equity should give redress to the person who has been made to suffer such irreparable injury.

In such cases it is true it should clearly appear, first, that the commission of such criminal offense would entail a private loss; and, secondly, that the remedy afforded at common law for such loss is clearly and unmistakably inadequate.

This is not the enunciation of any new doctrine. In *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551, it was held upon demurrer (syllabus): "That the acts of the defendants, as alleged by the bill, amounted to crime, and that the court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property."

Sir R. Malins, V. C., in passing upon this identical question, makes use of this language (p. 558):

"The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate destruction of property, or to make it less valuable or comfortable for use or occupation."

Lord Eldon, in the case of *Macauley vs. Shackell*, 1 Bligh (N. S.) 96, 127, says: "The court of equity has no criminal jurisdiction, but it lends its assistance to a man who has, in the view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his publication."

In *Hopkins vs. Oxley Stave Co.*, 83 Fed. 912, the court held (syllabus):

"First, that the combination in question was an unlawful conspiracy to deprive the plaintiff of its right to manage its business as it thought best, such as would entitle the manufac-

turer to recover from the parties concerned in the conspiracy whatever damages it had sustained thereby; second, that in such a case the test of the right to sue in equity was whether the damages occasioned by the conspiracy would be irreparable, or whether a proceeding in equity was necessary to prevent a multitude of suits,—in other words, whether the remedy at law was for any reason inadequate; third, that in the case in hand the plaintiff was entitled to sue in equity, and that an injunction to prevent the execution of the conspiracy was properly awarded.” And in the opinion, the court declares, (p. 918):

“The test of the right to sue in equity, is whether the combination complained of is so far unlawful that an action at law will lie ‘to recover the damages inflicted,’ and whether the remedy at law is adequate to redress the wrong. If the remedy at law is for any reason inadequate, resort may be had, as in other cases, to a court of equity.”

In *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, the court quotes the following language:

“Again, it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law.”

And in *Port of Mobile v. Louisville & N. R. Co.*, 84. Ala. 115-126, 4 So. 106, 112, the court declares:

“The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable

injury which will result from the failure or inability of a court of law to redress such rights."

It is true that most, if not all of these cases are ones in which a court of equity gave relief by injunction, as against striking workingmen. But if it be the law as against workingmen, why should it not also apply to capitalists?

The defendants in the case at bar, under the allegations of the bill, have practically a monopoly of the pressed and paving brick business in the County of Cook, but the same rule of law should apply to them as to the workingmen, especially in view of the fact that it is alleged in the bill that the damages occasioned by their conduct, are not capable of being definitely ascertained in a court of law; that the business of the complainant is being ruined; and that its damages would be irreparable.

If the allegations in the bill of complaint are true, as the demurrer admits, the defendants are engaged in the commission of a crime punishable by a fine of not less than two thousand dollars (\$2,000.00), and a forfeiture of all their corporate rights. In the perpetration of this crime, under the allegations in the bill, they are entailing irreparable financial loss to the complainant. To refuse it relief by injunction and relegate it to a court of common law, for the purpose of attempting to ascertain its loss after its business is ruined, would be denying it the relief which, under every principle of equity, it is entitled to.

In the absence of a statute making such an agreement criminal, the complainant might be, under the older authorities, without remedy, but in view of the plain provision of the anti-trust law of this state, and the authorities rendered in jurisdictions where such laws are in force, the right to relieve by injunction is, in the judgment of this court, unquestioned.

NOTE.—The above case is referred to in a note in 64 L. R. A. 720. See also *Sanford v. People*, 121 Ill. App. 619, where the court held the same combination to be illegal.—Ed.

(Circuit Court of Cook County.)

Elizabeth Smith, Guardian of Matt. C. Jones

VS.

**Julius Rosenthal, Administrator of the Estate of
Henry Jones.¹**

(September 17, 1866.)

1. **MARRIAGE—VALIDITY OF DEPENDS ON LAW OF PLACE WHERE SAME TAKES PLACE.** The validity of a marriage is to be determined by the law of the place where the ceremony is performed and if valid there it will be valid everywhere.
2. **INTERNATIONAL LAW—WAR POWER—EMANCIPATION OF SLAVES.** The condition of slaves follows the fortune of war. If the conquering state holds slaves, the slaves merely change masters, if it does not, the slaves are emancipated.
3. **MARRIAGE—VALIDITY OF RELIGIOUS MARRIAGE—DUTY OF COURTS.** The courts are very cautious in pronouncing against marriages which were celebrated according to the peculiar rules of any religious sect, or according to the manner and customs of any nation or race of people.
4. **SLAVES—VALIDITY OF MARRIAGE BETWEEN, UPON EMANCIPATION.** A marriage between two slaves is to be treated as valid after emancipation even though during slavery they were deprived of all civil rights. The children born of such a marriage are entitled to all the rights of legitimate children.

Petition of guardian of a minor child to have child born of a slave marriage declared the only heir of the decedent and that the administrator be compelled to pay to the petitioner certain funds in his hands. Heard before Judge Thomas B. Bradwell. The facts are stated in the opinion.

BRADWELL, J.:—

Henry Jones was a colored man and died intestate at Chicago on the 27th day of April, A. D. 1863. Administration was granted by this court on the following day to Julius Rosenthal.

All the assets of said estate have been collected, all debts paid, and the balance of \$608.66 is now in the hands of the

¹ This case is reprinted from Vol. II, Sol. Jour. & Rep. p. 81.—Ed.

administrator, subject to the order of court, to be paid to the heirs of the deceased.

Elizabeth Smith, guardian of Matt. C. Jones, appointed by the county court of Brownsville, Tenn., filed her petition in this court alleging that her ward is the only heir of the deceased, and asking that a decree be entered to that effect, and that the administrator be compelled to pay her the balance now in his hands. The administrator answered the petition, and stated that he knew nothing of the matters alleged therein and called for strict proof. On the hearing several depositions were read, all similar to that of William Saughter, which is, in substance, as follows:

"Henry Jones lived for fourteen or fifteen years in Brownsville, Tenn., was of African descent, in color *ashy* black. He was sometimes called Henry Servier, because he was the slave of John Servier of Brownsville, Tenn., which place he left in the latter part of the year A. D. 1862, and went to Chicago. He was married to a girl named Emeline, the black slave of a Mr. William H. Loring of Brownsville, about thirteen years ago, by myself, then a justice of the peace in said town. After the marriage they lived together as husband and wife until the death of Emeline in 1862. They were recognized and regarded as husband and wife by their acquaintances and neighbors during that time. There were two children, the only fruits of that marriage, the one died in infancy, the other, Matt. C. Jones is still alive, resides in Brownsville, and was born on the 4th of September, 1860. Jones never had any other wife or child, or children, than as I have stated. He and his wife were both slaves at the time of this marriage, and were married with the consent of their masters."

It was also proved that when our army advanced into Tennessee, Jones was taken by the military power and sent North under the written order or command to pass "Henry Severe, colored;" that at the time of his death he had obtained a residence in Chicago; and that after his liberation by the military power he often spoke of Matt. C. as

his son, and that he intended his money for him. It was claimed on the argument that the parties, both being slaves at the time of the marriage, could not control or give their consent to such an undertaking, and that the child was consequently a bastard and not capable of inheriting.

Jones' domicile at the time of his death being in this state, his personal property must be distributed according to the law of Illinois, and this law must determine who are his heirs. The validity of the marriage is to be determined by the law of Tennessee, and if valid there, will be valid here, unless there is some statute in Tennessee imposing conditions contrary to the general law of nations which might work as a prohibition of marriage. At the time Jones left Tennessee the constitution of the United States provided that the fugitive should be delivered up on the claim of the party to whom labor or service should be due; but Jones was no fugitive; he had not escaped from labor or service due in Tennessee, and could not then have been taken back legally under this provision of the constitution and the then existing fugitive slave law. He was taken by the strong arm of the Government of the United States, and, at the moment of his capture, his shackles fell—he was transferred from a chattel to a free-man.

Mr. Dana, in a note to his edition of "Wheaton's International Law," sec. 348, in treating of the right to emancipate slaves under the war power, says: "But as persons capable of being used by the will of the master or his state, irrespective of their own will, in war, as soldiers, or as laborers, the occupying sovereign has the right to transfer this faculty of service from the enemy to himself. They are so directly liable to state control in war, that their condition follows the fortunes of the war. And, as the slaves are grouped, at least temporarily, in families, with rights at least moral, in the service and affection and duty of one another, the transfer included the whole slave population—of women, children, and persons not capable of labor—as appurtenant to the laborers. If the occupying state holds slaves, the slaves merely change masters; if it does not, the slaves are emancipated."

Jones having been freed by the war power, I shall treat his case, from the time of his capture, as I would the case of an emancipated slave.

(The learned judge then entered into an elaborate discussion of the natural rights arising out of marriage, and referred to statutes and authorities to show that marriages between slaves were not forbidden in Tennessee or any other southern State. He then proceeded):

Under the civil law, Matt. C. Jones would be declared the legal heir of the deceased, and entitled to his estate, notwithstanding the claim that Jones and his wife were slaves at the time of their marriage. Legitimacy and lawful marriage were some of the pleasing sounds following individual emancipation at Rome hundreds of years ago. Shall it be deprived of these pleasing sounds in the nineteenth century? and shall liberty fail to recognize the marriage relation between slaves when slavery, with all its cruelty, and in the days of its greatest power, when it numbered its victims by millions, was compelled to give a quasi-recognition to this relation? What! when slavery said the cohabitation between the black slave and his wife was innocent and free from sin and under law of God, pure, shall liberty, after emancipation, say that such cohabitation was adulterous, immoral, and sinful, and that the fruits of such marriage are bastards? If so, the emancipated slave may well say, "God deliver me from emancipation."

The courts have always been very cautious in pronouncing against "marriages which were celebrated according to the peculiar rules of any religious sect, or according to the manner and customs of any nation or race of people, as will appear from the following cases:

The supreme court of Missouri, in *Johnson v. Johnson's Adm'r*, 30 Mo. 73, in passing upon the validity of a marriage between a white man and an Indian squaw, says:

"Among the savage tribes of North American Indians,

marriage is merely a natural contract, and neither law, custom, nor religion has affixed any conditions, limitations or forms other than those which nature herself has prescribed. Permanency is not to be regarded as an essential element of marriage by the law of nature; otherwise all such connections as have taken place among the various tribes of the North American Indians—either between persons of pure Indian blood, or between half-breeds, or between the white and Indian races—must be regarded as illicit.”

“The law of states where slavery is prohibited, or not sanctioned, recognizes neither slavery nor property in slaves, within their own territorial limits.” *Anderson v. Poindexter*, 6 Ohio State, 622, 674.

Judge Skinner in delivering the judgment of the court in *Rodney v. Illinois Central Railroad Company*, 19 Ill. 42, 44, says: “Slavery in the states where it exists, has its foundation in the municipal regulations of such states, which have no extra-territorial operation, and no binding force in another sovereignty. * * * The owner, therefore, by force of the laws of another state, under the law of Illinois, has no property in the fugitive, and can here, under State authority, assert no property in, or power over him.” With the law of slavery the reason for the law has passed away, and courts will not recognize the effect of the institution for the purpose of bastardising the issue of the dead or slandering the living. The slave of the Southern states owed service to his master, not by the law of nature, but under the local law, which law fixed the termination of that servitude at the end of the natural life of such slave. The strict legal right to the service is the same in the parent as in the master; the only material difference is in the duration of the term. In the case of the emancipation of the child from the power of the father, the marriage contracted during his servitude is good unless he repudiates it upon arriving at his majority.¹ Apply this principle to the emancipated slave, and a marriage contracted during slavery would be good upon emancipation, if the parties

¹ See *Crawford v. Crawford*, 1 Ill. C. C. 453.—Ed.

were all living, and if it is claimed that the right to inherit must be fixed at the time of the death, and that at that time the master of Jones would have taken the estate, it is a sufficient answer to this proposition to say that, in case of the death or incapacity of the person to take, the law looks for the next party entitled to the inheritance. The master has been removed; his claim (if he had any) forever barred; and he has left no successor or representative—he is the last of his race. We look for some one else to take the estate, and find that the constitutional amendment has emancipated his child and removed the only pretended barrier between him and his father's estate—slavery. The common law ignores slavery and all its consequences, and therefore the common law courts are barren of decisions upon the questions now before the court, and I have to determine this case more upon principle than upon the weight of former judicial decisions. Now that slavery has been abolished by the bullets of our soldiers and the ballots of our citizens; that universal liberty is the great corner-stone of this really free republic; that all men stand equal and free before the law; that hundreds of thousands of our bravest sons have shed their blood and lain down lives to establish and maintain in this government the great truths “that all men are created free and equal and are endowed by their Creator with certain inalienable rights; and among these are life, liberty and the pursuit of happiness,” and now that the policy of the government, and of the courts, state and national, is in favor of liberty, and that the legislation of congress and of the states is in the spirit of humanity to make, as far as possible, these unfortunate people forget that they were slaves, and to protect them in the full enjoyment of all their civil rights, free from any of the disabilities of slavery or its consequences, it cannot be claimed that the decisions made by the courts of slave states when the policy of the government and the courts was to sustain and perpetuate the power of the master over the slave are to be regarded now in deciding this case; made when all presumptions were in favor of the master and against the

slave, and when in a Southern state to have a black skin was prima facie evidence that a man was a slave, and would compel him in a court to prove his freedom. Were there a thousand of these decisions, made under this influence, in favor of slavery and against the conclusions I have come to in this case, I would brush them aside as I would a spider's web, and decide this case upon what I consider to be the first principles of law, justice and humanity.

I am, therefore, of the opinion that the marriage between Jones and his wife was valid; that during slavery they were deprived of civil rights; that upon the emancipation of Jones and the petitioner they were possessed of their civil rights, and for the purpose of this suit are to be treated as if they had never been slaves; that Matt. C. Jones is the only surviving child of the deceased, and as such entitled to inherit his estate. To come to any other conclusion would be to say that the representatives of a race were bastards; and that millions, for generations, have been living in adultery, when they had done all in their power to make their connection lawful. The view I have taken of this case makes it unnecessary for me to examine the civil rights bill passed by congress, or the enabling act of the Tennessee legislature."

NOTE.—See the cases of *Lewis v. King*, 180 Ill. 259; *Butler v. Butler*, 161 Ill. 451, on the validity of slave marriages. See also, the case of *Lewis v. Mayo, Adm.*, reported immediately following this case.—Ed.

(County Court of Cook County.)

John Lewis, David Lewis and Ophelia Lewis

vs.

**Simeon Mayo, Administrator of the Estate of John Reelay,
alias Lewis.**

(January, 1869).

1. **SLAVES—VALIDITY OF MARRIAGE BETWEEN.** Marriages of slaves, consummated during slavery in a slave state in which there is no statute declaring such marriages void, are valid for all purposes after the emancipation of such slaves.

Petition to have slave marriage declared valid and to recognize petitioners as lawful heirs of decedent. Heard before Judge Thomas B. Bradwell. The facts are stated in the opinion.

F. W. Becker, for petitioners.

A. N. Waterman, for administrator.

BRADWELL, J.:—

The deceased was a colored man. His real name was John Lewis. He was held as a slave, in Virginia, until the late war, when he ran away, came to Chicago and changed his name to Reelay. He died intestate, in Chicago, about two years ago, leaving some property.

The evidence shows, that the intestate, about twenty years ago, then being a slave in Virginia, agreed to marry the slave woman of another master. That, with the consent of their masters, a large party of slaves were called together one evening to witness the marriage—that a Methodist class-leader did pronounce them husband and wife; after which they lived together for many years as such, and had three children who are the petitioners in this cause.

The mother of these children was sold about the time of the capture of Harper's Ferry, and sent off further South, since which time she has not been heard from. I am now asked to find that these three children, are the legal heirs of said intestate, and entitled to the property of which he died possessed.

It is claimed that the father and mother at the time of the marriage were property; and, therefore, unable to contract or enter into the marriage relation.

This court, at the September Term, in 1866, in the case of *Matt. C. Jones against Julius Rosenthal, Administrator, etc.*,¹ examined, with some care, the authorities in regard to the validity of a slave marriage, and, as I have had no reason to change my opinion since that decision was rendered, it will be sufficient, to dispose of this case without going again into

¹ Reported herein. See also the note to same.—Ed.

the reasons given, or the authorities cited, in that case, simply to read the head-note to that opinion, which is as follows:

"Henry Jones, a negro slave, was married in Tennessee, by a justice of the peace, to a colored woman, the slave of another master, with the consent of their masters. They had one child while in slavery, the fruit of such marriage, called Matt. C. Jones—the mother died in slavery. Jones and Matt. C. were afterward emancipated. *Held*, after the death of Henry Jones, that such marriage was not void; and that Matt. C. was the legitimate son of Henry Jones, and, as such, entitled to inherit his estate; notwithstanding the fact that his parents were slaves at the time of their marriage and his birth.

"Marriages of slaves, consummated during slavery in a slave state, where there is no statute declaring them void, are good for all purposes upon emancipation."

Mr. Clerk, let an order be entered, finding the marriage between the intestate and the said female slave valid, and the three petitioners his children, and heirs-at-law.

(Circuit Court of Cook County.)

Catharine Durgon

vs.

Susannah McGuire, Administratrix of the Estate of Bernard McGuire.

(October 1, 1868.)

1. **MARRIAGE—AT COMMON LAW—ESSENTIALS OF.** It is not necessary to constitute a valid marriage that there should be a legal ceremony. If the parties made a present agreement to live together as man and wife and such agreement was actually consummated and the parties continued to cohabit together as man and wife, this will constitute a valid marriage.
2. **COMMON LAW MARRIAGE—HOW PROVEN.** A common law marriage may be proved by the declarations and conduct of the parties and by reputation. It is not necessary that record evidence should be adduced.

Action by plaintiff to recover for services rendered the decedent. Heard before Judge Erastus S. Williams and a jury.

The deceased, Bernard McGuire, was a cooper who lived in Chicago. The plaintiff lived with him for about seven years, supposing she was his wife, and performed all the duties of a wife, they having agreed to live together as such. There was no ceremony performed by any minister or officer, and no marriage license issued. By their joint labor they acquired quite an estate, and when, by reason of his fallen fortunes and bad habits before his death, he became unable to support himself and family, she, by washing, and the aid obtained from a son of hers by a former husband, succeeded in keeping his real estate clear, the taxes paid thereon, and the family together till his death.

He died, and then her claims as a wife were denied. It appeared that doubts once arose in the mind of plaintiff as to the standing of her boy born of this father. These she stated to the father, and then it is alleged he quieted her mind by some ceremony which he performed, and which he said was customary in the "old country." It is also stated that McGuire always acknowledged and introduced plaintiff as his wife, from some time in 1861 until April of this year, and that taking the child to be baptized according to the rites of the Roman Catholic Church, he acknowledged the paternity and perhaps the matrimonial alliance. The plaintiff was about to take out letters of administration when the technical question was raised, and the letters were issued to the daughter, who is defendant.

The plaintiff sought to recover for her services while she was living with the deceased, believing herself to be his wife. The whole case turned upon the question of marriage.

The defendant's counsel cited the following authorities: *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *In re Taylor*, 9 Paige, 611; *Rose v. Clark*, 8 Paige, 574, 582; *Cheney v. Arnold*, 15 N. Y. 345, 350; *Jewell v. Jewell*, 1 How. 219; *Starr et al. v. Peck*, 1 Hill, 270; *vide* 2 Kent's Com. 87; and note, citing the decisions in different states; Reeve's Domestic Rela-

tions, 306; Bishop on Marriage and Divorce, 168; *Case of Wall v. Williamson*, 8 Ala. 48; *Wall v. Williams*, 11 Ala. 826; *Morgan v. McGee*, 5 Humph. 13; *Johnson v. Johnson*, 30 Mo. 72.

The counsel for plaintiff conceded that if the court should charge the jury that the facts constituted marriage, then the plaintiff's case failed.

WILLIAMS J.:—

The jury are instructed by the court that to constitute a marriage valid and binding upon the parties thereto, it is not necessary that all the statutory requirements in reference thereto should have been complied with by the parties, and if the jury shall believe, from the evidence, that the deceased and the plaintiff made a present agreement, by which the deceased, then and there, took the plaintiff to be his wife, and the plaintiff, then and there, took the deceased as her husband, and they mutually agreed to live together then and thereafter as husband and wife, and if they shall further believe, from the evidence, that plaintiff and deceased, from the time of such agreement up to the death of McGuire, continued to cohabit as man and wife, then there was a valid and binding marriage between the said plaintiff and the said McGuire. That, in order to prove a marriage between the plaintiff and the deceased, it is not necessary that record evidence should be adduced, nor that the marriage should be proved by witnesses present when the marriage contract was made, nor that any religious ceremony should have been performed, but the marriage may be proved by the declarations and conduct of the parties, and by other circumstances which usually accompany the marriage relation, and by reputation; and if the jury shall believe, from the evidence in this case, that the deceased and the plaintiff cohabited together as husband and wife, and that the deceased spoke of the plaintiff in the presence of his family and others as his wife, and she in his presence and in the presence of others, spoke of him as her husband, and deceased made no objection to being so addressed, and that the plaintiff, with the knowledge and assent of de-

ceased, united with him in signing deeds and other instruments as his wife, that plaintiff and deceased appeared in respectable society as man and wife, and were so addressed by others without objection on their part, and if their child was addressed and treated by them, in the presence of each other, as the child of both of them, born in lawful wedlock, and if the plaintiff, with the knowledge of deceased, generally assumed his name, all such facts are competent evidence upon the question of marriage, and should be considered by the jury in arriving at their verdict.

(In the Circuit Court of Cook County.)

Frank Bruley, et al.

vs.

The Royal League.

(April, 1908.)

1. **MUTUAL BENEFIT SOCIETIES—THEIR CONTRACTS—DUTY OF COURTS IN REGARD THERETO.** Courts should see to it that the by-laws and contracts of mutual benefit societies, where just and reasonable, are enforced.
2. **INSURANCE—RECOVERY OF PREMIUMS PAID AFTER POLICY FORFEITED.** Premiums paid by an insured after his policy has been forfeited, may be recovered by his legal representatives in an appropriate action.
3. **MUTUAL BENEFIT SOCIETIES—AGREEMENT BY BENEFICIARY TO BE BOUND BY AFTER ENACTED BY-LAWS—EFFECT.** An agreement by a member of a mutual benefit society to be bound by after enacted by-laws is binding on him unless the by-laws so enacted are unreasonable.
4. **INSURANCE—FORFEITURE OF POLICY—AGREEMENT THAT OFFICERS CANNOT WAIVE.** Where an insured agrees in his contract for insurance that officers and agents cannot waive a forfeiture of the policy, such an agreement is binding on him and the insurer is not estopped from insisting on a forfeiture although it is claimed that the officers or agents waived it.
5. **WORDS AND PHRASES—"IMPLIED WAIVER"—"ESTOPPEL."** The terms "implied waiver" and "estoppel" have been held in cases where

insurance contracts are involved to be synonymous terms meaning the same thing.

6. **ESTOPPEL—KNOWLEDGE OF FACTS.** One of the essential elements of an estoppel is that the party to be estopped has knowledge of the facts.
7. **NOTICE—KNOWLEDGE OF AGENT AS KNOWLEDGE OF PRINCIPAL.** It is a well settled principal of law that knowledge of the agent will not be presumed to be the knowledge of the principal except where the agent is acting within the scope of his authority.
8. **ESTOPPEL—MISLEADING OTHER PARTY.** An essential element in the doctrine of estoppel is that the party claiming the benefit of the estoppel must have been misled to his prejudice by the conduct of the other party.
9. **ESTOPPEL—FACTS WITHIN KNOWLEDGE OF BOTH PARTIES.** Where a person claiming an estoppel has equal knowledge of the facts with the person against whom the estoppel is sought to be enforced, he will not be heard to say that he was misled by the conduct of the other party.
10. **MUTUAL BENEFIT SOCIETIES—WAIVING SUBSTANTIAL PROVISION OF POLICY—POWER OF OFFICER OF SUBORDINATE COUNCIL.** The officer of a subordinate council of a mutual benefit society cannot waive a provision which is of the substance of the insurance contract.
11. **SAME—WAIVING FORFEITURE OF POLICY—RELATION BETWEEN SUPREME AND SUBORDINATE COUNCILS.** The relation of a subordinate council to the supreme council is that of agency and the subordinate lodge may waive a forfeiture resulting from a violation of the by-laws of the supreme lodge.
12. **SAME—BY-LAW MAKING SUBORDINATE COUNCIL AGENT OF ASSURED.** The subordinate council will be regarded as the agent of the Supreme Lodge with power ordinarily to waive a forfeiture, even though the by-laws attempt to make it the agent of the assured.
13. **INSURANCE—CONSTRUCTION OF CONTRACTS—AMBIGUITY.** Insurance contracts should be liberally construed in favor of the insured and strictly against the insurer; and where two interpretations equally reasonable are possible that construction should be adopted which will enable the beneficiary to recover.
14. **Where A became a member of a mutual benefit society and signed a contract stipulating that if he engaged in the liquor business his rights as a member would be forfeited, and he agreed to be bound by all the by-laws of the society, and thereafter the society adopted by-laws which provided that those engaged in the liquor business could not become members; that all members who did engage in that business should stand sus-**

pended; that the acceptance of assessments from members so engaging should not be a waiver of the prohibition, and that a member engaging in the prohibited occupation might be reinstated if he afterward relinquished said occupation; and A thereafter engaged in the prohibited occupation, being so engaged at the time of his death and paid his dues regularly to the collector of the society with knowledge on the local officers' part that he had become so engaged; it was *held*: that the parties having expressly stipulated to a contrary effect, the acceptance of the assessments, even with the knowledge of the officers of the local lodge of A's engagement in the prohibited occupation, did not estop the society when sued upon A's policy from defending on the ground of A's occupation as under the law applicable to the facts set forth, the essential elements of an estoppel were lacking.

Heard before Judge John Gibbons. The facts are stated in the opinion.

J. J. Rooney, attorney for plaintiff.

George W. Miller, attorney for defendant.

GIBBONS, J.:—

This is a suit brought on a benefit certificate issued by the defendant to one Frank Bruley. The special plea of defendant alleges that said member had forfeited his beneficial membership on account of engaging in a prohibited occupation known as saloon keeper in violation of the by-laws and his contract with the defendant. The replication is in the nature of a confession and avoidance, admitting the forfeiture and alleging by way of avoidance that the defendant has waived the forfeiture through the acts of its agent by thereafter accepting and retaining dues and assessments from said Bruley with knowledge of his forfeiture. To this replication the defendant demurred.

The following abstract of the pleadings will show the status of the case. The declaration of plaintiffs alleges that on February 8, 1898, at Chicago, defendant, for a valuable consideration, executed, sealed and delivered to Frank Bruley, a certificate in writing, wherein and whereby defendant, subject to laws governing Phil Sheridan Council and Widows' and Orphans' Benefit Fund, then in force or that might thereafter be enacted, promised to pay plaintiffs, children of Frank

Bruley, a sum not exceeding \$4,000 upon satisfactory proof of death and surrender of certificate provided Bruley was in good standing at time of his death and that the certificate had not been surrendered and a new one issued at his request.

That thereafter Bruley was transferred by defendant from Phil Sheridan Council to McKinley Park Council; that plaintiffs are the persons named as beneficiaries in said certificate and that Bruley died May 1, 1904; that Bruley was at time of his death a member of defendant order in good standing and had in all respects complied with all conditions of said certificate and laws, rules and regulations governing said Phil Sheridan and McKinley Park councils on his part to be performed; that he paid all dues and assessments levied against him; that said certificate was not surrendered nor any other one issued; that said certificate was in full force and effect at time of death.

It is further alleged that plaintiffs have complied with all terms and conditions of said certificate; that they notified defendant of Bruley's death and surrendered certificate to defendant, and that by reason of the premises defendant became liable to plaintiffs for \$4,000 and being so liable promised to pay, etc., to the damage of plaintiffs in the sum of \$6,000,

A copy of the certificate is attached to the declaration. The defendant filed the general issue and also, by leave of court, filed a special plea, alleging that defendant is a fraternal insurance society transacting its business as is provided in the statutes of Illinois, and its charter and by-laws.

That before Bruley was admitted to membership and before the issuing of said benefit certificate he signed a certain contract containing the following provision: "I agree to comply with all the laws, rules and usages now in force or which may be adopted by the order." That relying on this contract defendant issued the benefit certificate containing the following: "This certificate is issued to Frank Bruley, of Phil Sheridan Council, No. 54, Royal League, located at Chicago, Illinois, upon evidence received from said council that he is a contributor to the Widows' and Orphans' Benefit Fund of this Order * * * and upon condition that said member complies in future with the laws, rules and regulations

now governing said council and fund or that may hereafter be enacted by the Supreme Council to govern said council and fund, all of which are also made a part of this contract, * * *” which certificate was accepted by Bruley.

That thereafter Bruley surrendered this certificate and on February 8, 1898, a new one containing same provisions was issued to him.

That after Bruley was admitted to membership and prior to his death, the Supreme Council of defendant in April, 1898, enacted by-laws in part as follows:

“Sec. 2: Persons who have been rejected by any insurance company or association within two years * * * and saloon keepers and those engaged in the manufacture and sale of intoxicating liquors are not acceptable risks and cannot become members of this Order.”

“Sec, 3: All beneficial members of this Order are prohibited from engaging in or pursuing any of the occupations or employments enumerated in the preceding section of this law and any member of the Order who shall, after obtaining membership therein, become engaged in or pursue any business or employment enumerated in Section 2 of this law shall stand suspended from and forfeit all interest in the Widows’ and Orphans’ Benefit Fund from and after the date of his engagement in such prohibited business, and no benefit or benefits shall be paid to the beneficiary or beneficiaries of any member on account of the death of such member occurring while he is engaged in any of the said employments enumerated.”

That thereafter, in April, 1899, section 3 was amended by adding thereto the following:

“In case any assessment shall be received from a member who has thus engaged in a prohibited occupation after his admission, the receipt thereof shall not continue the benefit certificate of such member in force, nor shall it be a waiver of his engaging in such prohibited occupation.”

That said by-laws remained in force up to Bruley’s death and as such were a part of his contract.

That before being admitted to membership and before de-

livery of certificate Bruley signed another contract contained in medical examiner's blank providing in part, as follows: "And I do further for said purpose represent and declare that I am not now engaged in any of the following occupations or employments, * * * saloon keeper or the manufacture or sale of intoxicating liquors. I am not addicted to the excessive use of intoxicating liquors, opium or other injurious substances, and should I become so addicted or actively engaged in any of the above enumerated occupations or employments, my so doing shall forfeit and absolutely terminate thereafter all rights, interests, payments, benefits or privileges of myself, my family, heirs, dependents or beneficiaries without proceedings for expulsion or otherwise on the part of said association," which contract was signed by Bruley.

That Bruley on July 1, 1903, became engaged as a saloon keeper and continued in such occupation until his death; that he thereby violated said by-laws of defendant notwithstanding his agreement to conform therewith, and violated the contract not to engage in said business, and by reason of the promises all rights, interests, benefits, payments and privileges of said Bruley and his beneficiaries became forfeited and defendant discharged from liability under said certificate.

Replication to first special plea filed, confessing allegations of the plea and avoiding the same by alleging that defendant through its authorized officers and agents became informed and well knew the fact that Bruley had become engaged as a saloon keeper and continued in such engagement up to time of his death, and that with such knowledge, defendant, by its authorized officers and agents, continued to treat and assess Bruley as one of its members and to receive and accept from him up to his death monthly dues and assessments required to be paid by its members and has ever since retained said dues and assessments.

Defendant filed a general demurrer to the replication to said first special plea. Thereafter before the demurrer was disposed of defendant, by leave of court, amended its first

special plea, which amended special plea contained all the allegations set up in the original first special plea and in addition thereto certain other by-laws which were in force on May 1, 1903, and continued in force until Bruley's death, as follows:

"Law 2, sec. 3, subsection 3. If such member shall permanently relinquish said occupation or employment he may be reinstated in the same manner as though suspended for non-payment of assessments."

"Law 2, sec. 4, subsection 4. The receipt and retention of dues and assessments shall not, in any case, constitute a waiver of any law or defense which might have been relied on by this Order had such payments not been received and retained."

"Law 4, sec. 3, subsection 2. All beneficiary members admitted prior to July 1, 1902, and all such members admitted on and subsequent to said date, shall pay to the collector, on or before the last day of each calendar month, the following rates of assessment," etc.

"Law 4, sec. 6, subsection 2. The Collector shall be considered to be the agent only of the member paying assessments, and any acts of omission or commission of the Collector shall not bind the Order, nor in any manner waive any part of the Constitution or laws of the Order."

The said first amended special plea of defendant further alleges that Bruley on July 1, 1903, became engaged as saloon keeper notwithstanding his agreement to the contrary; that he continued in said occupation up to his death without the knowledge of the managing officers of defendant; that he thereby violated the aforesaid by-laws of defendant notwithstanding his agreement to conform therewith, and further violated his contract not to engage in said business, and that by reason of the premises all rights, interests, benefits, payments and privileges of Bruley and his beneficiaries were forfeited and defendant discharged from all liability under such certificate.

The plaintiffs filed a replication to said amended first spec-

ial plea, confessing the allegations thereof and avoiding the same by alleging that shortly after Bruley became engaged in said occupation the officers and members of McKinley Park Council, a subordinate council of defendant, including the scribe and collector of said council, became informed and well knew that Bruley was so engaged and knew that he continued to be so engaged up to his death, and with such knowledge defendant, acting through said subordinate council, continued to treat the benefit certificate issued to Bruley in full force and effect and continued to recognize Bruley as one of its beneficial members up to the time of his death, during all of which time it demanded, accepted and retained from Bruley the combined monthly dues and assessments required to be paid by its beneficial members holding like certificates, and defendant has ever since then retained the same.

To which replication the defendant filed a general demurrer and upon the facts thus pleaded the Court must determine as a matter of law whether or not a recovery may be had on the certificate, by reason of the fact that the local council knowingly continued to receive and retain the assessments paid by Bruley after he became engaged in the prohibited business.

By its demurrer to the replication to said first amended special plea, the defendant admits, as alleged therein, that the subordinate council had full knowledge that Mr. Bruley while one of its members had engaged in the occupation of a saloon keeper and continued in that occupation up to the time of his death, in violation of the by-laws of the defendant, and his agreement to comply therewith; and with that knowledge of the subordinate council, the defendant continued to treat him as a member and to assess, receive and retain from him up to the time of his death, all monthly dues and assessments required to be paid by its members, and that it has ever since retained the same.

The plaintiffs specifically contend that the acceptance of the dues and assessments arising from the insurance policy constitute a waiver of the forfeiture by reason of the facts

alleged in their replication, and contend that there is a waiver of the forfeiture because of the conduct of the subordinate council of the defendant in continuing to treat the benefit certificate of Bruley as being in full force and effect and in recognizing Bruley as a beneficial member up to the time of his death; by accepting, collecting and retaining the monthly dues and assessments paid by him under his benefit certificate, with full knowledge on its part of the forfeiture incurred by him, and so the replication to the said amended first additional or special plea of the defendant alleges that "at or shortly after the time said Bruley became so engaged in said occupation, the officers and members of the subordinate council of the defendant, known as McKinley Park Council No. 218, Royal League, including the scribe and collector of said council, became informed and well knew of the fact that he, said Bruley, had become so engaged and well knew of the fact that he continued in said occupation up to the time of his death, and with such knowledge, the defendant, acting through said subordinate council, continued to treat the benefit certificate so issued to said Bruley as being in full force and effect and continued to recognize said Bruley as one of the beneficial members of the defendant up to the time of his death. On this state of facts it is contended that by reason of the alleged conduct on the part of the subordinate council, the defendant is estopped from now insisting upon the forfeiture incurred by reason of Mr. Bruley engaging in the prohibitive occupation. The defendant, however, contends that it is not liable on the policy because Mr. Bruley expressly agreed that his engaging in the occupation of a saloon keeper would forfeit all rights under its policy and that in case any assessment should be received from him while thus engaged, the receipt thereof would not continue the policy in force or be a waiver of his engaging in that business; and that because Mr. Bruley had incurred the forfeiture by engaging in the occupation of a saloon keeper no acts or conduct on the part of the said subordinate council inconsistent with the right of the defendant to insist upon a forfeiture can estop it from

now setting up the same as a defense to the suit on the insurance policy,

Fraternal insurance should, and doubtless would, be the popular and ideal plan of insurance if the members were true to themselves and the local councils were conducted along the lines of correct business methods. The rules and by-laws of every corporate body are designed for the common good of its members, and if in a specific case the court places its seal of approval upon the infraction or evasion of a by-law, by a subordinate council or lodge, it thereby establishes a precedent which may benefit the family interested in the specific case, which, if followed in a number of cases, will inevitably endanger, if not destroy, the security of thousands who for years faithfully observed and complied with every obligation imposed upon them by the laws of the order.

The only safe rule for courts to pursue, in cases of this nature, is to ascertain what the charter and by-laws of the order are and rigidly enforce them. It is a matter of common knowledge that fraternal insurance companies have been greatly hampered and well nigh ruined because of the lax business methods pursued by subordinate councils, and, as a matter of self-preservation, the supreme or governing bodies have been forced to adopt stringent by-laws and to make strict contracts, such as we find in the case at bar, in the interest of the thousands of widows and orphans whose securities in societies of this nature depend entirely upon the honest administration of their fiscal and prudential affairs. Courts must see to it that their by-laws, when fair and reasonable, are upheld, and their contracts, when just and equitable, enforced. Actuated by these considerations, and influenced by a firm sense of duty, the by-law and contract involved in the present case, will be upheld and enforced by this court, unless the contention of learned counsel for plaintiff is fortified by the greater weight of authority, or appeals to me as being the more reasonable and just.

In this connection I may state that by reason of the forceful argument advanced and the great number of authorities cited by counsel for plaintiffs, I was strongly inclined to fol-

low the contention that the by-law in question is invalid, for the reason that no provision is made therein for the return of the dues and assessments paid by the insured during the period which the policy was forfeited. But the court is of opinion that this question does not necessarily arise in the present status of the case because the representatives of the deceased may, in an appropriate action, be able to recover the amounts so paid. Until an administrator of Mr. Bruley's estate is appointed, there is no person to whom the defendant could legally pay the money. *Thompson v. Travelers Ins. Co.*, 91 N. W. (N. D.) 75.

Passing to the more serious legal question involved, the case upon which the contention of learned counsel for plaintiffs is principally based is *Supreme Tent K. of M. of the World v. Volkert*, 25 Ind. App. 627, 57 N. E. 203. The decision in this case is by the appellate court, and, although a very able court, is not a court of last resort. The section of the by-law there considered provides, "If a member engages in the sale of intoxicating drinks he shall be suspended from the order without action on the part of the officers; * * * and in case any assessment shall be received from a member who has thus engaged in a prohibited occupation after his admission, the receipt thereof shall not continue the benefit certificate of such member in force, nor shall it be a waiver of his engaging in such prohibited occupation." Some time after appellee's husband was accepted as a member, he did engage in the saloon business, and sold intoxicating drinks, and while so engaged, died. The officers of the local tent knew that appellee's husband was engaged in selling intoxicating drinks, and with such knowledge, continued to accept his dues and assessments up to the time of his death. Upon the death of the member the society refused to pay the amount named in the policy on the ground that the insured had engaged in the prohibited occupation of a saloon keeper. Notwithstanding the insured had agreed that his engaging in that occupation would forfeit all rights under his policy, and that the receipt of any assessment after his so engaging in that

prohibited occupation would not continue his beneficiary certificate in force or constitute a waiver of his engaging in such occupation, the court held that the receipt of dues and assessments by the local agent of the company, with knowledge on his part that insured was so engaged in the prohibited occupation, together with certain other facts, which will be hereafter noticed, estopped it from setting up such a forfeiture of the policy.

It will thus be seen that the by-law in that case was similar to the by-law in the case at bar, but the contract was not identical with the one here sued on. The distinction arising from the dissimilarity of the contracts will be alluded to hereafter.

The Indiana court, in speaking of the answer filed by the supreme tent to the complaint in that case, said: "The answer alleged in substance, that the appellant is a mutual, fraternal, beneficial society, incorporated under the laws of the State of Michigan; that the supreme tent is the highest authority in the association, and authorized to prescribe laws for its government. Subordinate to this are great camps and subordinate tents. It is further averred that the laws of the supreme tent enter into and become a part of the contract between the association and its beneficial members. The answer then sets out *verbatim* certain provisions of the laws governing the association, showing the manner in which it is organized, its objects, etc. And among other laws pleaded is the prohibitory clause, which contains the following: 'And no person shall be eligible for membership in the order who is engaged, either as principal, agent or servant, in the manufacture or sale of spirituous, malt or vinous liquors as a beverage; and, should any beneficial member of the order engage in any of the above named prohibited occupations after his admission, his benefit certificate shall become null and void from and after the date of his so engaging in such prohibited occupation, and he shall stand suspended from all rights to participate in the benefit funds of the order, and no action of the tent or of the supreme tent shall be a condition precedent to such suspension. The record keeper, when any such

suspension takes place, shall not receive further assessments from such suspended member. He shall enter such suspension on his records, and report the same to the supreme record keeper, as he would report any other suspension, giving date and cause thereof; and, in case any assessment shall be received from a member who has thus engaged in a prohibited occupation after his admission, the receipt thereof shall not continue the benefit certificate of such member in force, nor shall it be a waiver of his engaging in such prohibited occupation.' The laws set out in this paragraph also show that a regular application must be made for membership, showing, among other things, the occupation of the applicant. The laws also provide that the subordinate tent shall be the agent of the members in making application for membership, the collection and transmission of dues and assessments, the serving of notices and the like. The answer then proceeds to aver that the deceased, Thomas H. Powell, applied for membership on the 21st day of September, 1893, through the Indianapolis Tent No. 35, organized as a subordinate tent in the city of Indianapolis; that said application was in writing, signed by the appellant, upon a blank form furnished for the purpose; and that, in reliance upon the representations made in the application, the beneficial certificate was issued to the deceased. The answer then avers that the deceased engaged in the saloon business, and admits that assessments were received thereafter, but without knowledge on the part of the association that he was so engaged, and that the association had no such knowledge until after his death."

The court in speaking of the replication filed to said answer, said: "In the affirmative reply to the first paragraph of answer, facts are alleged whereby it is sought to show a waiver and estoppel on the part of the appellant. It is averred that ten months after the insured engaged in the saloon business, appellant, with full knowledge of the fact, continued to recognize him as a member, and continued to levy and collect assessments and dues of him up to the time of his death; that on the day of his death an officer of appellant called at

the saloon of decedent, then knowing it to be such, and collected and receipted for assessments and dues which he claimed to be then due; that all of said assessments so collected, have been retained by appellant; that, although appellant knew he was so engaged in the saloon business, it failed and refused to suspend him, and up to his death continued to recognize him as a member in good standing. In the third paragraph of reply it is averred that an officer of the subordinate tent to which the decedent belonged, on the day he died, called at his place of business, and collected dues and assessments, and forthwith remitted the same to the appellant, and informed appellant that the said insured was dead, and that at the time of his death he was engaged in the saloon business; that, with such knowledge, appellant accepted and retained the money paid upon such assessment, and never offered to pay or tender it back." It was further alleged in the replication that the supreme tent after it received such notice retained the dues and assessments and sent blanks for proof of death.

The court held that under these facts the defendant was estopped to deny liability and the plaintiff's judgment for the amount of the policy was affirmed.

Another case wherein the by-law is exactly similar to the one in the above case, and which holds diametrically opposite thereto is that of *Schmidt v. Supreme Tent K. of M. of the World*, 97 Wis., 528, decided by the supreme court of Wisconsin; wherein it appears that at the time Schmidt joined the order he was a baker, but he thereafter opened a saloon in the basement of the building used by him as a bakery, and obtained a retail dealer's liquor license. He died while still engaged in the saloon business, and had paid two or three assessments after the fact of his engaging in such business was known to the officials of his subordinate tent. The supreme tent had no knowledge of the fact until after his death. The by-laws of the order provided for a forfeiture in case of any member engaging in the saloon business and further provided that: "In case any assessment shall be received from a mem-

ber who is thus engaged in a prohibited occupation after his admission, the receipt thereof shall not continue the benefit certificate of such member in force, nor shall it be a waiver of his engaging in such prohibited occupation." A trial was had before the court without a jury, which resulted in a judgment for the defendant from which the plaintiff appealed. The court affirmed the judgment and in discussing the question of waiver by the acceptance of dues and assessments, said: "It is undisputed that Schmidt engaged as principal in the business of selling liquor as a beverage in June, 1894. By this act he became suspended from the order by the terms of the by-law. There was no waiver resulting from his payment of assessments thereafter made, because the by-law in question, which has become a part of the contract, expressly provides that such payments shall not constitute a waiver."

No case can be found which is more directly in point than the case last above quoted, and since it is an opinion of the highest court of the state of Wisconsin, it should have greater weight than the case decided by the appellate court of Indiana, unless the reasoning of the latter court is the more logical, or the conclusion reached is the more just and reasonable.

There is one fact connected with the Indiana case which would distinguish it from the Wisconsin case, and on which alone the soundness of its decision might be upheld. It is, that on the day of his death an officer of the subordinate tent called at the place of business of the deceased, collected the dues and assessments and remitted them to the supreme lodge and informed the supreme lodge that the insured was dead and that at the time of his death he was engaged in the saloon business. The supreme lodge, with this knowledge, accepted and retained the dues and assessments and sent blanks for proof of death. The fact that the supreme lodge had received dues and assessments without knowledge that the deceased was in the prohibited business, and after his death with full knowledge thereof, retained the dues and assessments received by it before his death, as well as those received thereafter, besides sending blanks for proof of death,

accept premiums from the insured. This was relied upon as a waiver, but the court held that by reason of the agreement contained in the policy in regard to the agent's authority there was no waiver. On this point the court said (p 362):

"The plaintiff's case stands solely on the proposition that because it is alleged and the jury have found that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed, and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to the insured. * * * The plaintiff's case at its best is based on the alleged fact that the agent had been informed at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense and escape from the operation of the condition is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would as we have seen, entirely subvert well settled principles, declared in the leading English and American cases, and particularly in those of this court."

The opinion in the above case is exhaustive and contains a review of a great many authorities upon the point in issue.

In *Phoenix Insurance Co. v. Mazon*, 42 Ill. App. 164, the court said: (p. 170).

"Where a policy, already issued and delivered, contains a condition which, by the terms of the instrument, can be waived only in writing, and by a certain officer named, an attempted parol waiver by another does not bind the insurance company."

The doctrine of implied waivers has no direct bearing upon the case under consideration. This doctrine is applied to the

facts in *Bennett v. Union Central Insurance Co.*, 203 Ill. 439; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354; *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410; *Illinois Life Association v. Wells*, 102 Ill. App. 544; *Supreme Lodge K of P. v. Wellenvoss*, 119 Fed. 671; *Modern Woodmen of America v. Lane*, 62 Neb. 89, 86 N. W. 943; *Pelkington v. National Ins. Co.*, 55 Mo. 172; *Cannon v. Home Ins. Co. of N. Y.*, 53 Wis. 585 11 N. W. 11; *Lutz v. Anchor Fire Ins. Co.*, 120 Ia. 136, 94 N. W. 272; *Battin v. Northwestern Mut. Life Ins. Co.*, 130 Fed. 874.

The contention may be conceded that the rule of estoppel has been frequently applied to cases where the insured agreed that there could be no waiver of a forfeiture, and in cases where the waiver could only be in writing; *Metropolitan Life Ins. Co. v. Sullivan*, 112 Ill. App. 500; *Dwelling House Ins. Co. v. Dowdall*, 55 Ill. App. 622; *Coverdale v. Royal Arcanum*, 193 Ill. 91; *Phoenix Ins. Co. v. Grove*, 116 Ill. App. 529, affirmed, 215 Ill. 299.

In *Modern Woodman v. Coleman*, 64 Neb. 162, 89 N. W. 641, the doctrine of estoppel was applied although the insured agreed that there could be no waiver of a forfeiture, but a careful analysis of these cases will show that each one is dissimilar in some of its facts from the case at bar.

The waiver here contended for is not a formal or express waiver, but rather an implied waiver or estoppel. The terms "implied waiver" and "estoppel" have been held in cases where insurance contracts were involved to be synonymous terms meaning the same thing. *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308.

It is therefore important to consider what the elements of an estoppel are, because if the necessary elements are not present in this case, then there can be no estoppel. One of the essential elements is that the party sought to be estopped has knowledge of the facts. *Pease v. Trench*, 98 Ill. App. 24; *Wright v. Stice*, 173 Ill. 571.

It is a well settled principle of law that the knowledge of the agent will not be presumed to be the knowledge of the principal except where the agent is acting within the scope

of his authority. *Consolidated Coal Company v. Block & Hartman Smelting Co.*, 53 Ill. App. 565.

In the present case it does not appear that under the laws of the Royal League the officer whose duty it is to collect dues and assessments has any authority relating to the question of forfeiture on account of entering into a prohibited occupation. On the contrary, it is expressly provided that any acts of omission or commission by the collector shall not bind the order or in any manner waive any part of the constitution or laws of the order. It is also provided that the receipt of assessments shall not be a waiver of the forfeiture. Hence, in this case, the officer who is claimed to have knowledge of the forfeiture, did not receive the same within the scope of his authority as an agent, and therefore, his knowledge cannot be imputed to the defendant.

Another essential element in the doctrine of estoppel is that the party claiming the benefit of the estoppel must have been misled to his prejudice by the conduct of the other party. And it has been held that where the person claiming the estoppel had equal knowledge of the facts with the person against whom the estoppel is sought to be enforced, he will not be heard to say that he was misled by the conduct of the other party, and is therefore not entitled to the benefit of the estoppel. (Authorities *infra*.)

Under the express provisions of the contract in this case, the officer who received the assessments from Bruley after he had gone into the saloon business had no authority to waive the forfeiture, and the contract also expressly provided that should the assessments be accepted and retained, still the forfeiture would not be waived. No one was better apprised of these facts than was Bruley, because he was conclusively presumed to know the laws of the order which were a part of his contract, and therefore knowing, as he did, that such acceptance of dues and assessments would not waive his forfeiture, it certainly cannot be claimed that he was misled.

In *Kocher v. Supreme Council, Catholic Benevolent Legion* 65 N. J. L. 649, 52 L. R. A. 861, after the member had dis-

appeared his beneficiary continued to pay the assessments until she heard that he was dead. The supreme secretary then told her that she need not pay any further assessments until she found out whether or not he was dead, and if living, she could pay up the back assessments and restore him to good standing. The member afterwards returned, and a tender of the unpaid assessments was refused by the society, claiming that his membership was forfeited. The trial court held that the conduct of the supreme secretary was a waiver of the forfeiture. Upon appeal it was held that the secretary had no power to waive the laws of the Order, and that the forfeiture was a good defense. In its opinion, the court said: "The powers and duties of the supreme secretary as defined in the constitution and by-laws, are largely clerical, * * * but he is no where clothed with power to waive or suspend any of the provisions of the constitution and laws of the Legion. *

* * It is true that the law of agency applies to officers of corporations, and that if any officer of a corporation is allowed to exercise general authority in respect to the business of the corporation or a particular branch of it * * * the corporation is bound by his acts in the same manner as if the authority was expressly granted. * * * But this immunity is extended to those only dealing in good faith with such officers, and who do not know or are not bound to know the limitations of their power by the provisions of the company's charter.

* * * In the present case the plaintiff is not in the attitude of one dealing with the corporation in good faith and without notice. * * * Besides it is a general principle that persons entering mutual companies are presumed to know the terms of the charter and by-laws under which they are organized. Nor can the officers of such associations dispense with the terms and conditions of such charter and by-laws unless they are expressly authorized to do so. * * * The officers of a mutual association have no power to waive by-laws relating to the substance of the contract between an individual member and his associates in their corporate capacity."

In *Schimp v. Cedar Rapids Insurance Co.*, 124 Ill. 354, the

court said: "The waiver or estoppel relied upon, cannot prevail. It is destitute of that element which is most essential to either. It does not appear, nor is it claimed, that the assured has been misled in any manner to her prejudice by the company accepting payment of the note."

In *Grand Lodge A. O. U. W. v. Jesse*, 50 Ill. App. 101, the laws of the order required that a health certificate be filed in case a member who was suspended more than 30 days sought reinstatement. Jesse was suspended more than 30 days and thereafter the subordinate lodge accepted the back assessments, and reinstated him without the health certificate. The Grand Lodge refused to accept the money and returned it to the subordinate lodge which in turn returned it to the member. The member died about one year after. Suit was brought on the certificate. The plaintiff claimed that the subordinate lodge was the agent of the grand lodge, and that its acts estopped the grand lodge, and that the member was misled by them. Of this point the court said (p. 108):

"If it be assumed that Douglass Lodge and its officers were agents of the grand lodge in all matters pertaining to the collection of assessments, it does not follow that they had authority to waive any of the laws of the grand lodge, which relate to the substance of a contract between an individual member and the grand lodge. * * * The constitution of the Grand Lodge provided the only method for reinstating a beneficiary certificate after it had been suspended for 30 days. The officers of the subordinate lodge could not waive these requirements. * * *

"It appears in evidence that Charles Jesse had about a year before been recorder of Douglass Lodge and knew in fact, as well as being bound to know, the rules and laws of the society.

"We see no ground for holding that the appellant is estopped from denying its liability because of the conduct of the officers of the subordinate lodge in reinstating Jesse without the certificate of good health."

Royal Highlanders v. Scoville, 66 Neb. 213, 92 N. W. 206, was a suit on a benefit certificate which provided for payment

on condition that the member comply with all the laws, edicts, etc. One of the laws provided that in case of suspension reinstatement might be had if the member was in good health and not engaged in any prohibited occupation. The member was suspended and subsequently took sick. A few hours before her death, the beneficiary, acting as the agent of the member, paid the arrearages, but said nothing about the condition of the member's health. The society refused to pay the claim, and when sued, set up the forfeiture to which the plaintiff replied that the acceptance of the assessments was a waiver. The court held that there was no waiver, and in its opinion said: "It is insisted, however, by the plaintiffs, that the acceptance of the assessment by Mr. Glover was a waiver of the condition of good health. We cannot agree with this contention. The members of a mutual benefit association are conclusively presumed to know its rules and regulations, and the assured therefore must have known that her good health was a condition precedent to her right to reinstatement. She was not acting, therefore, in good faith to the lodge in tendering the payment of her dues in view of the condition of her health."

In *Phoenix Insurance Company v. Maxon, supra*, it is said: "Where the assured is notified of the limitation of the authority of the agent, the former cannot rely upon the statements of the latter in excess of his authority."

Boyce v. Royal Circle, 99 Mo. App. 349, 73 S. W. 300, was a case of forfeiture for non-payment of dues and a waiver was claimed because the local secretary thereafter received the dues contrary to the provisions of the laws of the order. The court in its opinion said: "At the close of the defendant's evidence the court instructed the jury to return a verdict for plaintiffs for the full amount of the certificate, apparently on the assumption that the local secretary of the Cabool Circle by accepting payments of Henderson's monthly dues for May, June, July and August, waived his default, restored him to membership, and reinstated his certificate of insurance in full force and effect."

"That is a view of the law which we cannot accept. The spontaneous action of local secretaries of this and kindred societies in accepting dues from suspended members contrary to the constitution or by-laws, whether the acceptance be due to ignorance or complaisance, does not, ipso facto, reinstate the insurance, and cannot have that result unless the settled rules of laws governing contractual obligations are set aside as to contracts of fraternal insurance."

The court then holds that if the supreme officers tolerated the acceptance of dues with knowledge of the facts, that there might be a waiver.

Continuing, the court said: "These contracts for fraternal insurance must be treated like other contracts. * * * Provisions for forfeitures should be strictly construed but not abrogated."

In *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, it is said: "A person who enters an association must acquaint himself with its laws, for they contribute to the admeasurement of his rights, his duties and his liabilities. * * *

* It is not one by-law or some by-laws of which the member must take notice, for he must take notice of all which affect his rights or interests."

The next point to be considered is whether or not Bruley's course of action was affected by reason of the acceptance of these dues by the collector. This is also a necessary element in an estoppel. How can it be said that Bruley was led to believe that the order had intended to waive his forfeiture by accepting his assessments, when as far as he knew, neither the order nor its agent was aware that he had forfeited his insurance. How could he expect that they would do anything else but accept his assessments until he knew that they were aware of his forfeiture? He made no effort to apprise the officers of his forfeiture nor to inquire what the attitude of the order would be. His course of action may have been influenced by two different intentions, as contended by learned counsel for defendant.

First, it may have been his intention to conceal the fact

that he was in the saloon business from the order and to continue paying his assessments so that if he died while the order was still in ignorance as to his forfeiture, his insurance would be paid. If this was his intention, then he was attempting to perpetrate a fraud upon the order, and it will be unnecessary to cite any authorities to support the proposition that in such case, his beneficiaries would not be entitled to recover in this case.

The second intention which he may have had in paying these assessments after his breach, was that if he should thereafter relinquish the prohibited occupation in which he was then employed, he might be reinstated in accordance with Law 2, sec. 3, subsec. 3, set forth in the amended first additional plea as follows: "If such member shall permanently relinquish said occupation or employment, he may be reinstated in the same manner as though suspended for non-payment of dues."

In support of this point see case of *Supreme Council of Royal League v. Moerschbaeche*, 88 Ill. App. 89.

This latter case is very similar in its facts to the case at bar, except that in the case now under consideration the by-law which provides that the receipt of dues and assessments shall not amount to a waiver was not in force, and therefore the case at bar is a great deal stronger case for the defendant than was the *Moerschbaeche Case*.

Moerschbaeche was a cigar dealer when he joined the order. He afterwards engaged in the saloon business in connection with his cigar business, and remained so engaged up to the time of his death. The collector of the subordinate council continued to receive dues and assessments from him up to his death with knowledge of his being engaged in the saloon business.

Moerschbaeche joined the order one year later than Bruley did, and signed the same contract, pleaded as a part of the medical examiner's blank. The case was tried by the court without a jury, and resulted in a judgment for four thousand dollars, from which an appeal was prayed.

Law 2, sec. 3, subsec. 1, set up in the amended first additional plea was also involved in the case.

The appellate court reversed the case without remanding, holding that under sec. 3, subsec. 1, aforesaid, the entering into the saloon business absolutely terminated all rights to benefits, and aside from this, that the express stipulation in the medical examiner's blank had a like effect. And as to the question of waiver, the court said: "Nor do we regard the question of waiver as having any application."

This *Moerschbaecher Case* should control the court in the case at bar, since the same contract is involved and the facts in each case are substantially similar, except that the defendant's position is strengthened in this case by the additional provision in the contract that the receipt of dues and assessments shall not amount to a waiver, which was not in the *Moerschbaecher Case*.

See also *Northwestern Mutual Life Insurance Co. v. Ammerman*, 119 Ill. 329. The contract in this case provided that employment as trainmen, with some stated exceptions, without written consent of the company would avoid the policy. The insured became a brakeman and wrote to the agents of the company for permission to pursue that employment. They answered that such permission could not be given, but that after he ceased to be so employed, his policy would then again be in effect. He afterwards received a notice of premiums and paid them. He was killed by the cars, and upon the refusal of the company to pay the insurance, suit was brought to enforce the collection of the sum.

In its opinion, the court said (page 336): "There can be no fraud if the parties to the transaction are equally informed of all the facts, and act independently upon such knowledge equally possessed by both parties. Nor can it be said that one party has been misled or induced to do an act by the conduct or declarations of another when there has been no suggestion of falsehood or suppression of the truth by silence or otherwise, and the party acts after full knowledge, upon his own judgment or according to his own inclination. If,

as before substantially stated, the assured paid the premium under the belief, fairly influenced by the acts and declarations of the agents of the defendant company that the policy was to be in force while he continued in the prohibited occupation, the acceptance of the money by the company would estop it from insisting upon the condition of the policy as a defense. The mere act, however, of receiving or collecting the premium by the insurance company, with knowledge of an existing right of forfeiture has, so far as we know, never been held to estop the company from setting up such forfeiture if the assured had no reason fairly to conclude from the acts and declarations of the company or its agents, that the forfeiture had been or would be waived, when he made the payment of the premium, or unless the payment was made in reliance upon the validity of his policy, induced by the acts, declarations or silence of the company."

In view of the foregoing authorities it would seem reasonable that the express provisions of this contract entered into between Bruley and the defendant should be enforced.

To permit a subordinate council, by the simple act of receiving a member's assessments, to modify or set aside provisions in the contract of insurance would result in the self-destruction of the order. If such were permitted to be done, then an individual collector of a subordinate council could overrule the will of the other thousands of members of the order, and permit members of his own council to engage in any occupation whatever, however hazardous it may be, and if he had the power to do this, it would follow that he would also have the power to waive the payment of assessments.

It has frequently been held by the courts that an officer of a subordinate council cannot waive a provision which is of the substance of the insurance contract.

In *Borgraefe v. Supreme Lodge K. & L. of H.*, 22 Mo. App. 127. The defense was one of forfeiture for nonpayment of dues. The plaintiffs claimed a waiver on the ground that the lodge continued to treat the deceased as one of its members. There was a judgment for plaintiff from which defendant ap-

pealed. On the question of waiver, the Court said: "The laws and rules governing the different branches of such an order are in the nature of contracts among all the members, and considering the widespread extent of these organizations, and the very great extent to which these schemes of benevolence have taken the place of life insurance, especially among the working classes, it is highly important as a principle of public policy, that in cases of this kind, their rules and regulations should be substantially upheld by the judicial courts. Unless this is done, these organizations cannot be maintained. Their benevolent purposes cannot be carried out, and their benefit certificates cease to afford any certain indemnity to the families of their members in the case of death."

In *Ancient Order U. W. v. Jesse*, 50 Ill. App. 101, 108, it is said: "If it be assumed that Douglass Lodge and its officers were agents of the Grand Lodge in all matters pertaining to the collection of assessments, it does not follow that they had authority to waive any of the laws of the Grand Lodge which relate to the substance of a contract between an individual member and the Grand Lodge. * * * The constitution of the Grand Lodge provided the only method for reinstating a beneficiary certificate after it had been suspended for thirty days. The officers of the subordinate lodge could not waive these requirements."

In *Kocher v. Supreme Council Catholic Benevolent Legion*, *supra*, the court say: "Besides it is a general principle that persons entering mutual companies are presumed to know the terms of the charter and by-laws under which they are organized. Nor can the officers of such associations dispense with the terms and conditions of such charter and by-laws unless they are expressly authorized to do so. * * * The officers of a mutual association have no power to waive by-laws relating to the substance of the contract between an individual member and his associates in their corporate capacity."

In Niblack on Benefit Societies, page 568, in discussing the question of waiver by acceptance of assessments by an officer where the contract was forfeited from the beginning, on account of the member giving a false age, it was said: "But

assuming that the treasurer acquired notice of the fact when he received the assessments, he had no power to ratify the invalid contract. He could not admit a member and thereby make a contract of insurance, and if he had no power to make such a contract for the corporation, he had no power to validate a void contract by any ratification."

The receipt of dues in the case at bar would have the same effect as the one assumed by Niblack. Bruley's contract was forfeited upon his engaging in the prohibited occupation without any action on the part of the order, and this is not seriously controverted by the plaintiffs. His contract with the defendant then came to an end, and if the receipt of assessments by the collector was a waiver, then the collector had the power to validate a contract, which had become void by reason of its own terms. If such be the law, it is useless for fraternal societies to make by-laws or contracts seeking to restrain or limit the authority of subordinate councils.

The learned counsel contend that *Coverdale v. Royal Arcanum*, 193 Ill. 91, is decisive of the case at bar, but as I view the case, it simply holds that a subordinate council of a benefit society is the agent of the supreme lodge or council, and that if with full knowledge of the falsity of the member's statement in his application, that he was never engaged in the business of selling intoxicating liquors, continues to receive his dues and assessments from him and treats the certificate in full force up to the time of his death, the right to forfeit the certificate by reason of the falsity of the statement is thereby waived; this is simply applying the familiar rule of estoppel to the facts as found by the jury in that case. This does not mean that the local council can abrogate a provision of the contract or nullify a by-law, binding upon the assured and the order of which he is a member and this is really the only point at issue in the present case.

Under this state of facts the supreme court held that the society was estopped to set up the forfeiture. The court said: "Under the facts as already stated, the subordinate lodge, or its officers and members, had full knowledge of the fact that Wasserman was engaged, at least a part of the time, in selling

liquor over the counter. With that knowledge the subordinate lodge continued to receive dues and assessments from him to the amount of \$575.00, from June 4, 1894, to the date of his death, on February 13th, 1896, a period of one year and a little more than eight months. During all this time the insurance certificate was treated as being in full force, and Wasserman was received and treated as a member, notwithstanding the knowledge on the part of the officers and members of the subordinate lodge of the falsity of the statement contained in his application. Certainly under the doctrine of *Order of Foresters v. Schweitzer, supra*, there was a waiver of the forfeiture of the certificate of insurance." See also, *Wood v. Mystic Circle*, 212 Ill. 532; *Orient Insurance Co. v. McKnight*, 197 Ill. 190, and cases there cited.

There was no provision in the by-laws nor in the contract in any of these cases, which would render the rule of estoppel anomalous and therefore the cases are not similar to the one now under consideration.

In *Moerschbaeher v. Royal League*, 88 Ill. App. 89, the member engaged in the occupation of a saloon keeper in violation of his agreement not to do so. In the replication filed by the plaintiff to the plea of the defendant setting up such agreement, it was averred that the defendant accepted from the member the quarterly dues and assessments of said member well knowing that he had become so engaged in the occupation of a saloon keeper. In that case a demurrer to said replication was overruled by the court and the replication was held to be good.

In *Germania Life Insurance Company v. Koehler*, 168 Ill. 293, the insured expressly consented that there could be no waiver of a forfeiture except by an express agreement of the company endorsed on the policy, the company was held estopped to insist upon a forfeiture after loss where the company, with knowledge of the forfeiture, continued to thereafter treat the policy as in full force by accepting and receiving premiums from the insured.

In *Fenix Insurance Co. v. Hart*, 149 Ill. 513, in speaking

of this question the court said: "The stipulation in the policy that the waiver could be made only by endorsement upon the policy by the general agent at Chicago, was inserted for the benefit of the insurer, and, like any other clause or condition of the policy, might be waived by the company."

To the same effect is *John Hancock Mutual Life Insurance Co. v. Schlank*, 175 Ill. 284.

In *Phoenix Insurance Co. v. Raddin*, 120 U. S. 183, the court, in speaking of this question said: "It follows that the only question upon the instructions of the court to the jury, which is open to the defendant on this bill of exceptions, is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens."

In *Hennessy v. Met. Life Ins. Co.*, 74 Conn. 699, 52 Atl. 490, the insured expressly agreed that there could be no waiver of any of the conditions or stipulations of the policy except by an agreement in writing signed by the president, vice president or secretary of the company. The court held that notwithstanding this agreement on the part of the insured, the company would be estopped from insisting on a forfeiture if it thereafter, with full knowledge, treated the policy as in full force without such waiver in writing. See also *Grand Lodge Ancient Order United Workmen v. Brand*, 29 Neb. 644, 46 N. W. 95.

It may be further conceded that many authorities are to the effect that the relation of a subordinate council of a benefit society to the supreme council is that of agency and that the subordinate council may waive a forfeiture resulting from the violation of the by-laws of the supreme lodge. This doc-

trine is supported in *High Court Ind. Order Foresters v. Schweitzer*, 171 Ill. 359; *Coverdale v. Royal Arcanum*, 193 Ill. 91; *Grand Lodge A. O. U. W. v. Lachman*, 199 Ill. 140; *Supreme Lodge Order of Mut. Protection v. Meister*, 105 Ill. App. 477; *Court of Honor v. Dinger*, 221 Ill. 176; *National Council, etc., v. Burch*, 126 Ill. App. 15; *Supreme Tent, etc., v. Volkert, supra*; *Modern Woodmen of America v. Coleman, supra*; *Ancient Order Pyramids v. Drake*, 66 Kan. 538, 72 Pac. 239; *Trotter v. Grand Lodge, etc.*, 109 N. W. (Iowa) 1099; *Brown v. Supreme Court, etc.*, 68 N. E. (N. Y.) 145; *Schlusser v. Grand Lodge*, 94 Md. 368; *Audre v. Modern Woodmen*, 102 Mo. App. 377; *Supreme Lodge, etc., v. Davis*, 58 Pac. (Colo.) 595; *McMahon v. Maccabees*, 161 Mo. 543; *Knights of Pythias v. Withers*, 177 U. S. 261; *Supreme Lodge v. Davis*, 58 Pac. (Colo.) 595.

In *Order of Foresters v. Schweitzer*, 171 Ill. 325, it is simply held that in associations of this character, the relation of the members to the order is necessarily through the subordinate lodges, and when a forfeiture of the certificate of insurance is insisted upon, it is proper to show that the subordinate lodge, with full knowledge of the alleged cause of forfeiture, continued to treat the insurance as in full force, receiving the member's dues and paying the money over to the supreme lodge, so as to show a waiver of the forfeiture.

In neither of the cases above cited was there a by-law or contract to the effect that the receipt of dues should not constitute a waiver of the forfeiture. While in the case of *National Council, etc., v. Burch*, 126 Ill. App. 15, it is expressly held that a suspension for non-payment of dues cannot be waived by an agent of a fraternal society by the acceptance of dues after the death of the member.

A similar rule was adopted in the following cases, notwithstanding the by-laws of the supreme council, attempted to make the subordinate council and its officers the agents of the members and not the agents of the supreme council: *Supreme Lodge, etc., v. Meister*, 105 Ill. App. 471; *Cline v. Woodmen*, 111 Mo. App. 606; *McMahon v. Maccabees*, 151 Mo. 543; *Bonard v. Banking, etc.*, 94 Mo. App. 450; *Modern Woodmen*

v. Coleman, 94 N. W. (Neb.) 814; *Schunck v. Fond*, 44 Wis. 374; *Ancient Order of Pyramids v. Drake*, 66 Kan. *supra*; *Knights of Pythias v. Withers*, 177 U. S. *supra*; *Brown v. Supreme Court*, 68 N. E. *supra*; *Murphy v. Ind. Order*, 77 Miss. 842; *Supreme Tent v. David*, 58 Pac. 597; *Audre v. Modern Woodmen*, 102 Mo. App. *supra*; *Brayman v. Grand Lodge*, 122 Mo. App. 354.

It may also be conceded that insurance contracts should be liberally construed in favor of the insured, and strictly against the insurer; and where two interpretations, equally reasonable, are possible, that construction should be adopted which will enable the beneficiary to recover. *Grand Lodge Select Knights v. Beaty*, 224 Ill. 350.

To the same effect is *Terwilliger v. Masonic Acc. Asso.*, 197 Ill. 9; *Supreme Lodge, etc., v. Meister*, 105 Ill. App. 474; *Bennett v. Insurance Co.*, 203 Ill. 439; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354; *High Court Order of Foresters v. Schweitzer*, 171 Ill. 325.

As the learned counsel relies so confidently upon the case of *Supreme Tent K. of M. of the World v. Volkert*, *supra*, it is proper to state that, in the affirmative reply to the first paragraph of the answer, "facts are alleged whereby it is sought to show a waiver and estoppel on the part of appellant. It is averred that ten months after the insured engaged in the saloon business, appellant, with full knowledge of the fact, continued to recognize him as a member, and continued to levy and collect assessments and dues of him up to the time of his death; that on the day of his death an officer of appellant called at the saloon of decedent, then knowing it to be such, and collected and receipted for assessments and dues which he claimed to be then due; that all of said assessments so collected have been retained by appellant; that although appellant knew he was so engaged in the saloon business, it failed and refused to suspend him, and up to his death continued to recognize him as a member in good standing. In the third paragraph of reply it is averred that an officer of the subordinate tent to which the decedent belonged, on the day he died, called at his place of business, and collected dues

and assessments, and forthwith remitted the same to the appellant, and informed appellant that the said insured was dead, and that at the time of his death he was engaged in the saloon business; that, with such knowledge, appellant accepted and retained the money paid upon such assessment, and never offered to pay or tender it back." It further affirmatively appeared that the supreme tent with full knowledge of the facts not only retained the assessment and dues, but sent blanks for proof of death.

There was still another distinguishing feature in this *Volkert Case* which should be pointed out, and that is, that there was a conflict between different provisions in the insurance contract relating to forfeiture in case of engaging in prohibited occupations, which may be seen by reference to the opinion.

It is quite evident that this *Volkert Case* was decided upon facts different from the facts in the case at bar, and since it further appears that the case was decided without having urged upon the court's attention the particular portion of the by-laws, relating to the waiver of forfeitures by the acceptance of dues and assessments, which is one of the main features of the case at bar, it cannot therefore be considered as directly analagous to the case at bar.

From a careful analysis of the authorities it will be noted that in a great many of the cases cited by counsel for plaintiffs there was no provision in the contracts or by-laws prohibiting officers and agents from waiving forfeitures. These cases were decided therefore on the broad ground that forfeitures being abhorrent to the law, may be waived by the party in whose favor they would result when all the elements of an estoppel are present. Such cases simply announce a correct and familiar principle of law, but are not controlling here because they have no direct bearing upon the question involved in the present case. In many, if not all the cases cited by plaintiffs, except the case of *Supreme Tent v. Volkert*, 57 N. E. 203, the provisions in the contracts and by-laws, relating to the powers of agents and officers to waive forfeitures were in general terms, such as "No agent or repre-

representative of the company shall have power to waive any provisions or conditions of the policy," etc., as appears in the case of *Dwelling House Ins. Co. v. Dowdall*, 55 Ill. App. 622. In this latter case it appears that all the facts were fully and truthfully stated to the agent of the company, and from them he drew his own conclusions and it was held that the company was estopped by the acts and conduct of its agent. The powers of an agent are *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.

To obviate the rule that written contracts cannot be altered or contradicted by parole courts have introduced the doctrine of equitable estoppels, or, it is sometimes called, estoppels *in pais*. The principle is that where one party had by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. This is what is meant by the doctrine of estoppel, as announced by the cases cited. But as Mr. Bruley must be held to have the same knowledge of all the conditions and limitations contained in the contract and by-laws which the agent possessed, the case at bar is unlike any of those cases in this respect. It is also unlike them, and the dissimilarity becomes the more apparent, from the fact that the contract and by-laws in question are not general in their terms, and at least one of the by-laws could not be couched in language more specific to make it apply directly to the facts in this case. Mr. Bruley agreed, in so many words, that if his certificate should become forfeited by reason of his engaging in the business of a saloon keeper, the receipt and retention of assessments would not continue his certificate in force, nor be a waiver of its forfeiture. This by-law by its terms makes express reference to a certain specific act of the subordinate officer to whom dues and assessments were paid, which is the very act claimed by the plaintiffs in this case to constitute an estoppel by operation of law.

The plaintiff's contention, therefore, finds no foundation

upon the cases where the stipulations against the power of agents to waive forfeitures were made in general terms. Besides, it will be found that in many of the cases cited the doctrine announced was that which had been applied to the construction of policies issued by what is known as the old line insurance companies. It will also be found that those of them in which fraternal insurance certificates are involved the distinction is not recognized because in each of such cases there were certain facts which brought them within the principles recognized by the courts in the older cases; but the rule announced in those cases is not the established rule relative to fraternal insurance cases.

As I view the authorities it appears to me that the trend of decisions in the more recent cases, both state and federal, is in favor of upholding and enforcing by-laws and contracts similar to those here considered and as the contract has already been approved by our appellate court in *Royal League v. Moerschbaeher*, 88 Ill. App. 89, it is my duty to follow the law as there announced, supported as it is by what I consider the better reason, as well as the greater weight of modern authority.

From my construction of the law, as applied to the facts pleaded, it necessarily follows that the demurrer to the replication of plaintiffs, to the first amended special plea of defendant, must be sustained: And it is so ordered.

(*Supreme Court of Illinois.*)

C. H. Roberts, et al.

vs.

C. Stigleman, et al.

(1874.)

PARTIES—PURCHASERS AT FORECLOSURE SALE. The court has no power to make the purchaser at a foreclosure sale a party to the record in the supreme court

Error to Jersey County, No. 74.

SCHOLFIELD, J.:—

The record in this case is that of a foreclosure of mortgage, and sale had under the decree. The motion is to make the purchaser at the mortgage sale a party to the record, and also to the supersedeas. We have no rule for making parties in such cases. The 9th rule provides that: "In all cases wherein guardians, executors or administrators, or others acting in a fiduciary character, have maintained an order or decree for the sale of lands in causes *ex parte*, and a sale has been had under such decree or order, and the same shall be brought to this court for revision, the purchaser or *terre tenants* of such lands, if known, shall be suggested to the court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error ten days before the first day of the term of the court to which the writ of error is returnable, so that said *terre tenants* may appear and defend."

It extends no further. We have no power to make other parties to the record than those who appear to have been parties in the court below. The motion is overruled.

(*Supreme Court of Illinois.*)

John Curtice

vs.

Joseph Beasley.

(1874.)

CONTINUANCE—MOTION OF APPELLANT—WHERE APPELLEE ENTERS APPEARANCE. The appellant is not entitled to a continuance where the appellee enters his appearance.

Appeal from Jackson County, No. 56.

MCALLISTER, J. :—

In this case there is a motion made by the appellee to dismiss the appeal for non-compliance with the order allowing the appeal, and a motion by appellant for the continuation of the case. The motion to dismiss the appeal is a mere repetition of a motion made at the last term, which was then denied. The motion for a continuance made on behalf of the appellant, is based upon the fact that the appellee, the administrators, come in and enter their appearance. The appellant says that that authorizes a continuance on his application. We have given this matter some consideration. There is no precise decision on the point, but this case was regularly in court, and, in case of a writ of error, where there was no service on the defendant, if he should come into court and enter his appearance, the plaintiff in error is bound to proceed now. We can see no cause for a continuance in this case. The motion for a dismissal of the appeal will be overruled, and also the motion for continuance. It will stand for hearing at this term.

(Supreme Court of Illinois.)

A. Pearson

vs.

G. L. Jones.

(1874.)

APPEAL AND ERROR—INSUFFICIENCY OF BOND—GUARDIAN OF MINOR HEIRS. It is not necessary for the minor heirs to sign the appeal bond where the guardian prays an appeal.

Appeal from Randolph County, No. 82.

MCALLISTER, J. :—

This is a motion to dismiss the appeal on the ground, as is alleged, that all the parties praying the appeal did not join in executing the bond. This was a suit against the estate of

one Darwin and the minor heirs sued by him. The general guardian prayed an appeal, and he executed the bond. There would be no sense at all in having the minors joined on the bond, and the motion is overruled.

(*Supreme Court of Illinois.*)

St. Louis & Southeastern Railroad Company

VS.

William Dorman.

(1874.)

DIMINUTION OF RECORD—RETURN. Upon suggestion of diminution of record and motion for *certiorari*, appellee must see that return is made in time.

Appeal from Hamilton County, No. 83.

SHELDON, J.:—

Diminution of record is suggested, and motion made for a writ of *certiorari*. The motion will be allowed, but the appellee will see to it that the return is made in time, as we shall not suffer the hearing to be delayed for want of the return.

(*Probate Court of Cook County.*)

**Frederick H. Wachsmuth and Louis Wachsmuth, Executors
of the Last Will and Testament of Henry
F. Wachsmuth, Deceased.**

VS.

Penn Mutual Life Insurance Co., et al.

(1907.)

- 1. ADMINISTRATION OF ESTATES—MORTGAGE OF REAL ESTATE BY EXECUTORS—CREDITORS IN PROBATE PROCEEDINGS—PRIORITIES.** A mortgage on the real estate of the deceased executed by the executors and securing their note is subject not only to the rights of such claimants as have proved their claims in the

pending probate proceedings, but also to the rights of all claimants who may thereafter prove claims due to them severally.

2. **JUDGMENTS—FORMER ADJUDICATION—WHAT NOT.** Unless the adjudication which is sought to be set up in bar is one in which the question involved in the proceeding in which it is plead, was in fact adjudicated or might have been adjudicated, it is no bar.
3. **ADMINISTRATION OF ESTATES—FORECLOSURE OF MORTGAGE GIVEN BY DEVISEE—RIGHTS OF CREDITORS OF DECEASED PARTIES.** The rights of the creditors of a testate deceased in his real estate cannot in any way be affected by proceedings which have their inception in a mortgage given by the devisee after the death of the testator; hence neither such creditors nor the deceased executors are proper parties to such a proceeding.
4. **SAME WHEN NOT RES ADJUDICATA AS TO EXECUTORS.** Even though the executors were proper parties to the foreclosure proceedings they were not bound by the decree in those proceedings in the failure therein to specifically attack their paramount right.
5. **MORTGAGES—SUBROGATION OF NEW MORTGAGEE TO RIGHTS OF OLD, WHAT NECESSARY.** In order to subrogate a mortgagee to the rights of a prior one there must be some privity between not only the mortgagor and the mortgagee but between the mortgagor, mortgagee and original lienor so that the new lien is taken in substitution for the old and the proceeds of the new applied to the payment of the old.

Petition to sell real estate to pay debts. Heard before Judge Charles S. Cutting. The facts are stated in the opinion of the court.

William Garnett, for petitioners.

Moran, Mayer & Meyer, for American Trust and Savings Bank.

Ashcraft & Ashcraft, for respondent, Penn Mutual Life Insurance Company.

CUTTING, J.:—

This is a petition for the sale of real estate to pay the debts of the decedent founded upon a certain just and true account filed in this court on the 12th day of December, 1905, from which it appears that the total indebtedness of said estate consisted of the following items:

Claim allowed Amelia Hartman, Jan. 16, 1901 ..\$	400.00
Claim allowed T. C. Brown, April 9, 1901	290.00
Claim allowed American Trust & Savings Bank, March 20, 1902	10,258.33
Interest on said last claim from date of allowance to date of said just and true account	1,902.00
Making a total of debts of said deceased \$12,850.33.	

It also appears that there were certain personal assets of the decedent amounting to \$5,595.08, leaving a deficiency of personal property to pay debts of \$7,254.25 at the date of said account.

The executors' petition for the sale of real estate to pay said deficiency was filed April 7th, 1906. To this petition the heirs, devisees and legatees under the will of Henry F. Wachsmuth together with the grantees of said heirs and legatees and all parties in possession of the real estate were made parties defendant. The petition alleges that the decedent at the time of his death was the owner of and died seized in fee simple of several tracts or parcels of real estate situated in Cook county, Illinois, one of which parcels of land is described as lots 22 and 23 in block 2 in the circuit court petition, of the S. E. quarter of sec. 3, T. 38, N. R. 14 east of the 3rd P. M. in Chicago, Cook county, Illinois, and known as numbers 461 and 463 East 47th street. The petition further alleges that at the time of the death of the decedent, said last described property was subject to a trust deed made by decedent to Edgar M. Snow, dated April 15th, 1896, securing the payment of \$11,000 by said Henry F. Wachsmuth, but further alleges that since the death of said Henry F. Wachsmuth, said trust deed has been released and said note cancelled, and that the Penn Mutual Life Insurance Company, Bernard Baumgarten and Henry F. West, trustee, have or claim to have some interest in the premises, which interest, if any, is subject and subordinate to the rights of the executors and of the creditors whose claims remain unpaid. As to this last described property only, the Penn Mutual Life Insurance Company defends and says, that the petitioners ought not to have and maintain

their action for the sale of said premises, being a part of the premises described in said petition, because, they say, that in and by his last will and testament the said decedent Henry F. Wachsmuth gave, devised and bequeathed unto one of the petitioners, his son, Louis C. Wachsmuth, the said last described premises; that said Louis C. Wachsmuth on the 25th day of February, 1901, was fully seized of all title to said premises and in possession thereof and being so seized, made, executed and delivered his certain promissory note payable to his own order and by him endorsed and delivered, for the sum of \$15,000, payable five years after date with interest at five per cent, and to secure the payment of said note and interest thereon, he, together with his wife, made, executed and delivered to Francis B. Peabody, trustee, a certain trust deed fully describing the premises last aforesaid, which trust deed was recorded on the 25th day of February, 1901, in the recorder's office of Cook county, Illinois; alleges that said trust deed provides that in case of breach of any of the covenants or conditions therein contained, the legal holder or owner of said note might declare said note due and foreclose said trust deed, whether the same was due by its terms or not. Said defendant further alleges in his plea that on the 31st day of January, 1903, more than two years after the issuing of letters testamentary aforesaid, and after the filing and allowing of all of the supposed claims and indebtedness, for which the alleged deficiency of personal property to pay debts in said petition arises, said defendant filed and exhibited in the superior court of Cook county, Illinois, its bill of complaint against the said Louis C. Wachsmuth and R. Mai Wachsmuth, his wife, and "against said Louis C. Wachsmuth and Frederick H. Wachsmuth, petitioners herein as executors of the last will and testament of Henry F. Wachsmuth, deceased" *et al.*, to foreclose the trust deed of Louis C. Wachsmuth and wife to Francis B. Peabody, trustee, in which bill of complaint the defendant alleged said indebtedness of \$15,000 evidenced by said promissory note five years after date with interest at five per cent, and the execution and delivery of said trust deed to

said Peabody to secure the same. That said defendant was then and there the legal holder of said note and trust deed, that default was made in payment of one of the installments of interest on said note, that it was provided that in case of such default the holder of said note might declare the same to be at once due and payable without notice and foreclose said trust deed for payment thereof with interest and solicitors' fees, etc.; alleges that there had been such default, that the legal holder had declared the whole of said notes due and payable, and that said petitioners as executors under said last will and testament, who were parties defendant, had or claimed to have some interest in said premises or some part thereof as "purchasers, mortgagees, judgment creditors or otherwise which interest, if any, had accrued subject to the lien of defendant's said trust deed and was subject and inferior thereto." Defendant further alleges the issuing of summons, and due service thereof upon the defendants thereto, petitioners here, and that thereafter said bill of complaint was taken as confessed against Frederick H. Wachsmuth as one of the executors of the last will and testament of Henry F. Wachsmuth, deceased, and upon the answer of Louis C. Wachsmuth, both individually and as one of the executors of the last will and testament of Henry F. Wachsmuth, and the report of the master in chancery, it was found by the superior court and adjudged and decreed by it that Louis C. Wachsmuth and wife executed said deed of trust, was indebted upon said promissory note for the full amount thereof with interest, etc., and that said defendant had a first lien on the premises hereinbefore, and in said trust deed, described. That payment was not made of the amount decreed to be paid, and that thereafter, the master in chancery, after advertising according to law, sold said premises for the sum of \$17,004.75; that said master issued his certificate of sale and the report thereof was duly approved by the superior court of Cook county; that there was no redemption from said sale as provided by law and that on the 20th day of October, 1904, said master conveyed to this defendant the premises last aforesaid

in fee simple, free and clear of all the supposed lien or claims of the defendant thereto, and of the right of the petitioners herein as executors of the last will and testament of Henry F. Wachsmuth to sell the same or any portion thereof to pay the debts of said Henry F. Wachsmuth, deceased.

This is a pure plea of *res adjudicata*, and if effectual is a perpetual bar to the sale of any portion of the premises therein described for the payment of the debts of Henry F. Wachsmuth, deceased.

It will be noted that at the time of the giving of the trust deed by Louis C. Wachsmuth and wife to Peabody, trustee, that the will of Henry F. Wachsmuth had been filed and probated in the probate court of Cook county, that one of the claims which forms the basis for the sale of real estate in this proceeding had been duly allowed, while the others, and by far the greater claims in amount, were not allowed in this court until after the execution of said mortgage. The purchaser of said note for \$15,000 therefore had notice, not only that probate proceedings were pending, but that at least one claim had been allowed before the execution and recording of the trust deed foreclosed in the superior court, and there can be no doubt that in law at that time, the rights of the trustee and the holder of the note were subject, not only to the rights of such claimants as had proved their claims but to the rights of all claimants who might thereafter in due course of administration, prove claims due to them severally.

This proposition is not disputed seriously but it is claimed that by the foreclosure of this trust deed given by a devisee under the last will and testament of Henry F. Wachsmuth, claims duly proven and allowed against the said estate are barred as to this particular property, because the executors were at a later date, made parties defendant to the foreclosure of such trust deed given by the devisee and that there was in the decree of the superior court foreclosing said trust deed the finding that the Penn Mutual Life Insurance Company, whose plea is under consideration, had a first lien on the premises described in said decree. It is insisted that

this is a finding of priority which the court has jurisdiction to make, and that having made such finding, no matter how erroneous, from which no appeal was taken or writ of error prosecuted, that it is binding upon the executors and also upon the creditors of the estate of Henry F. Wachsmuth, because they in such proceeding were necessarily represented by said executors. It is conceded that the superior court is a court of general jurisdiction, and for the purpose of this opinion, it may be conceded that in contemplation of law, the superior court is a circuit court, and that a petition for the sale of real estate to pay debts might have been filed in the superior court, as well as in the circuit or probate courts. I am, however, wholly unable to agree with counsel for defendant, in his claim that this decree of foreclosure is, as to this proceeding in this court *res adjudicata* so as to bar the rights of the creditors of Henry F. Wachsmuth. It is needless here to go into any exposition of the law relating to former adjudication, but it is enough to say, and I think the position is sustained by the authorities, that unless the adjudication which is sought to be set up in bar is one in which the question involved in the proceeding which it is plead, was in fact adjudicated or might have been adjudicated, it is no bar. No case is cited by counsel on either side which is directly in point. I have been cited to no case and have been unable, after diligent search, to find any case in which executors, during the period of administration, have been barred from selling real estate to pay debts because they were made defendants to and defaulted in a proceeding to foreclose a trust deed in the nature of a mortgage given by a devisee under the will through which they take title to their offices. The complainants in a bill to foreclose a mortgage given by a devisee in a will under which the executors are acting, could scarcely expect to litigate the question of priority in time as between themselves. The rights of the executors who claim through the ancestor, and directly from him, are necessarily from the very statement of the case, prior in time to those of the grantee of the devisee, so that an adjudication by any court

that the rights of the devisee were prior in time to those of the creditors of the deceased, would much resemble an adjudication that two and two make five or that 1906 is a later date than 1907. The equities, however, of an incumbrancer holding under deed from a devisee might be superior, possibly, to the alleged claims of the executors or their privies, but if that question is to be determined in a proceeding to foreclose a mortgage, it necessarily injects into the foreclosure proceeding an absolutely alien controversy; the whole probate of the estate would necessarily be involved if the executors answered to the bill to foreclose that they had been appointed executors and that there might be claims filed, the amount of which they did not know because the period of administration had not yet expired, and there could be no adjudication unless the superior court chose to take, by reason of this fact, the entire administration of the estate, which would not do and never has done under such circumstances. As was said in *Sutton v. Reed*, 176 Ill. 70, in speaking of a partition suit commenced while the estate of the ancestor was pending in probate, and it was sought to plead the decree in partition in bar of a claim filed in probate: "no question concerning the administration of the estate of Olivia Reed was raised or determined in that suit. The administration of that estate was then properly pending in the county court and the circuit court was not the proper forum to determine questions of the allowance of claims, and passing upon the accounts of the administrator." In a later case, *Crane v. Stafford*, 217 Ill. 22, also a case in partition, the master sought to allow certain claims which were due from the ancestor to his creditors and to pay them out of the proceeds of the sale of the real estate. The supreme court said "such claims are properly cognizable in a court of probate having jurisdiction of the matter of the administration of the estate of the deceased, but it was erroneous to allow them to be presented before the master in chancery and to decree that they be paid by that official out of the proceeds of the sale of land." Yet, if the executors sought in a foreclosure proceeding to set up their rights so that the

court could determine that their equities were superior to those of the mortgagee, that court must go into that question; it must determine the condition of the personal estate of the decedent, whether or not there was a deficiency so that a sale of real estate would be necessary to pay debts and determine all the other questions which would arise on a petition filed for that particular purpose. It would mean that the mortgagee could, by filing his bill to foreclose a mortgage, force the executors into what would in effect be a cross-bill for the sale of real estate to pay debts, because otherwise there could be no adjudication of the relative equities; the mortgagee, and not the executors, then, would select the forum and the time for the filing of such petition to sell real estate to pay debts. The adjudication of the probate court as to the allowance of claims is not final in the first instance except as to the personalty. *Ward v. Durham*, 134 Ill. 195; *Hopkins v. McCann*, 19 Ill. 113; *Moline Water Power Co. v. Webster*, 26 Ill. 233.

It is perfectly well settled that on a petition to sell real estate to pay debts, the heirs may contest the allowance of the claims, and the executors (or the claimants acting through them) must reprove their claims to bind the realty; so that if in the foreclosure proceedings the heirs deny the validity of the allowance of the claims in the probate court, the circuit court in this foreclosure matter would be obliged to take up and adjudicate each of the separate claims which constituted a part of the just and true account which must precede a petition to sell real estate to pay debts, thus creating numberless issues which are wholly foreign to a proceeding to foreclose and not cognizable therein. Not only that, but if the executors should attempt to assert their rights to this real estate at the time of the foreclosure, and the proceeds were not sufficient to pay the debts, the question of pro-rating between the several pieces of real estate, some of them included in the mortgage foreclosure and some not, would necessarily arise, since it would be quite inequitable to pay all of the debts out of one of the pieces of real estate when the several pieces were devised to different individuals, as in this case.

This would require the summoning of all the other devisees who are not interested directly in the foreclosure and would create still another issue wholly foreign to the foreclosure of the mortgage. But if the proceeding should eventuate in decree and all these issues should be determined, giving all these conflicting individuals their rights in the premises and determining just how much of the proceeds should be taken for the payment of debts, the full remedy to which the executors are entitled, as a matter of right, would be lost because a sale in foreclosure is always a sale with the right of redemption for a period of fifteen months, whereas the sale of property for the payment of debts is a sale without redemption, the purchaser immediately becoming owner thereof. It is needless to say that the rights of creditors are much better protected through a sale without redemption than through a sale with one. The plea shows that no issue was ever tried as between the executors and the mortgagees as to the rights of the claimants against the estate of the deceased. The sole claim for *res adjudicata* is founded upon the usual finding in default cases that the rights of the complainants are superior and prior to those of the defendants. A defendant ought not to be barred by an adverse finding in a proceeding in which his rights to the fullest extent could not be litigated.

It is a well settled principle of equity jurisprudence that one who claims rights in premises sought to be foreclosed, which are adverse to the title of the mortgagor and prior to that of the mortgagee cannot be made a party defendant and compelled to litigate his adverse title in such foreclosure proceedings. *Eagle Fire Co. v. Lent*, 6 Paige. 637; *Corning v. Smith*, 6 N. Y. 82; *Gage v. Perry*, 93 Ill. 176.

It is true that the usual application of this principle is found in that class of cases where adverse legal titles are involved, the reason for the rule being sometimes given that the legal titles should be determined at law and sometimes that the interests of the third parties being adverse to both mortgagor and mortgagee and their privies, the controversy as to such third parties is in no sense germane to the foreclosure. In the case at bar, the claimants against the deceased estate

who are the real parties to the proceeding have interests which are both adverse and necessarily superior to the rights of the devisee mortgagor. Hence, the application of the principle of the cases cited. Why should their claims against the deceased be brought into a proceeding which cannot, from the very nature of things either affect or declare their rights? In other words, the rights of the creditors of the testate deceased cannot be affected in any way by proceedings which have their inception in a mortgage given by the devisee after the death of the testator, and hence neither such creditors nor the deceased's executors are proper parties to such proceeding.

But it is insisted that though not necessary parties, the executors are proper parties to the foreclosure.

While the cases are not uniform in their holdings, a long and well recognized line of decisions holds that even in the case of the foreclosure of a second mortgage, the finding in the decree that the second mortgagee has a first lien is not binding upon the first mortgagee though a party defendant, unless there are allegations in the bill which specifically attack the paramount right of the first mortgagee. It is further held that the usual allegation in the bill that "the defendants have or claim to have some interest in the premises, but that such interests, if any, accrued subsequent to the time of complainants' mortgage and are inferior thereto" or any equivalent allegations, is not such an attack as will require the first mortgagor to answer, or support a decree by default as a bar to a subsequent bill to foreclose the first mortgage.

The holding is direct that such a decree, finding that a *second* mortgage is a *first* lien, is not *res adjudicata* as to the priority of the mortgages. The only holding directly in point on this proposition in this state is *Foval v. Benton*, 48 App. 638, which is cited with apparent approval in *Hibernian Bkg. Ass'n v. Law*, 88 Ill. App. 18, but in other states there are many cases of like holding. *Lewis v. Smith*, 9 N. Y. 502; *Strobe v. Downer*, 13 Wis. 10; *Puzzel v. Still*, 63 Vt. 490; *Bowne v. Page*, 2 Tyler, 393. Jones on Mortgages, 6 Ed., Sec. 1439, and many cases there cited.

With how much greater force does the reasoning of those

cases apply when the superior lien, instead of being one easy to ascertain, evidenced by a written contract of record and due at a specific date as in case of mortgage, is in process of determination in a court of competent jurisdiction, dependent upon complicated accounts, it may be upon the settlement of which and the determination of whether there is sufficient personalty to pay them, the very existence of the superior lien depends.

In the case of the mortgage the ascertainment of the lien is usually a matter of computation only, as in the cases cited, *supra*, while in the matter of the lien of the debts of the testator a practically complete probate of his estate is necessary before it can be determined whether there will be such lien or the amount thereof.

Perhaps the case nearest in point is *Emigrant Savings Bank v. Goldman*, 75 N. Y. 127, which involved the question as to whether the holder of a prior mechanic's lien, who was made a party defendant to the foreclosure of a subsequent mortgage under the usual formal allegation that the defendants have some rights which are subordinate to those of complainants, is barred by decree finding that complainant has first lien on property. The New York court of appeals said: "His claim was prior to the mortgage of plaintiff and he had a superior legal right to payment from the premises. It is settled that the only proper parties to a bill to foreclose so far as mere legal rights are concerned are the mortgagor and mortgagee and those who have acquired rights under them subsequent to the mortgagee (*Eagle F. Ins. Co. v. Lent*, 6 Paige, 635; *Bk. of Orleans v. Flagg*, 3 Barb. Chy. R. 318) and these parties only are affected by the judgment."

The court holds that the decree as to the prior lien holder is not *res adjudicata*, even though he was a party defendant and the decree seems to determine the priority of the liens.

In view of the authorities I must find that it is doubtful whether the executors were even proper parties to the foreclosure suit, but in any event under the pleadings they are not bound by the decree. In this view of the case it is quite

unnecessary to determine whether the executors so represent creditors of the estate, that such creditors are prevented from asserting their rights by reason of the failure of the executor to present their claims in the foreclosure suit.

I might add that I have received from counsel for the defendant, the citation of two cases: *Kehm v. Mott*, 187 Ill. 519; *Rohrhof v. Schmidt*, 218 Ill. 585. The language in the first of these taken by itself and away from the context seems to be directly in point and to sustain the controversy of the defendant, but a careful reading of the case shows that it applies only to a condition of things in no way like that at bar. The language of the court in that case was not necessary for the determination of the issues there made, is largely *obiter* and is not applicable specifically to the conditions that surrounded that case. The case of *Rohrhof v. Schmidt* is one in which the question was really not involved.

On the question of subrogation, which is raised, not by this plea, but by the answer, the question must, it seems to me, be a question of fact. If the facts are such as are stated in the case of *Bouton v. Cameron*, 205 Ill. 59, there can be no subrogation. In other words, the defendant must bring itself within the rule which is laid down in *Tyrrell v. Ward*, 102 Ill. 29, and cases which follow that case, namely: that there must be some privity between not only the mortgagor and the mortgagee, but between the mortgagor, mortgagee and the original lienor, so that this new lien is to be taken in substitution for the old and the proceeds of the new applied to the payment of the old. Where, however, the new mortgagee is a mere volunteer who has no relation to the original mortgagee, he cannot ask to be subrogated to the rights of such mortgagee. If, then, that is the case in this instance, I shall have to find, as a matter of fact, that there was no subrogation.

This, I think, disposes of all the matters connected with the case, except possibly the one which is disposed of inferentially, and that is that the answer in this case overrules the plea. I do not think it does. The two things, in my opinion, are distinct, and I have disposed of the plea, as I conceive, upon its merits, holding it insufficient in law.

(Court of Cook County.)

Clingman

vs.

The World's Columbian Exposition Co., et. al.

(May 29, 1893.)

1. **CORPORATIONS—CLOSING WORLD'S COLUMBIAN EXPOSITION ON SUNDAY—RIGHT OF STOCKHOLDER TO INTERFERE IN MANAGEMENT—BILL IN EQUITY.** A mere stockholder in the World's Columbian Exposition cannot maintain a bill in equity to close the fair on Sunday as in the absence of fraud, breach of trust or *ultra vires* he has no right to interfere in the management of the corporation.
2. **SAME—CONTRACT WITH CONGRESS—EFFECT OF NEW CONDITIONS.** Although the directors of the World's Columbian Exposition accepted a gift from congress on condition that the fair should remain closed on Sunday, yet they have the right to rescind this contract as congress subsequently attached other conditions.
3. **CONSTITUTIONAL LAW—PRACTICE OF RELIGION WITHOUT DISCRIMINATION—SUNDAY CLOSING.** Article 2 of the Illinois Constitution guaranteeing the free exercise of religion prevents Sunday closing based on a religious principle.
4. **SUNDAY—CLOSING FAIR ON THAT DAY—SECTION 317 OF CRIMINAL CODE—DISTURBING PEACE ON SUNDAY.** It can not be assumed without a showing that the opening of the fair on Sunday will disturb "the peace and good order of society" and thus violate section 317 of the Criminal Code.
5. **EQUITY—WHEN UNITED STATES NOT NECESSARY PARTY TO BILL.** No property rights of the United States being involved in this controversy, it is not a necessary party to the bill.
6. **EQUITY—DIVERSION OF PUBLIC PROPERTY—RIGHT OF TAXPAYER TO MAINTAIN BILL.** A taxpayer has the right to maintain a bill in equity to enjoin a private corporation from diverting public property from its dedicated use where such diversion affects his pecuniary interest as a stockholder.
7. **PARKS—REGULATION OF—CLOSING ON SUNDAY—BURDEN OF PROOF—ISSUING INJUNCTION.** In view of the statute declaring that Jackson Park shall be a public park free to all persons forever, the burden is on the persons claiming that a rule closing it on Sundays is reasonable, and where this is not done, a complainant is entitled on the face of his bill to a preliminary injunction restraining the closing.

Motion for preliminary injunction. Heard before Judge Stein. The facts are stated in the opinion.

William E. Mason, for complainant.

Edwin Walker, for defendants.

Messrs. Gault & Street, for intervening petitioner.

STEIN, J.:—

The bill in this case prays for an injunction against the South Park commissioners and the directors of the exposition to restrain them from closing the south park, and more particularly the fair grounds, on Sundays. Upon a motion for a preliminary injunction based upon the bill, counsel for the respective parties and for Charles H. Howard, an intervening petitioner, presented their views and argued the questions at issue with considerable fullness. The court has also had the benefit of the arguments of the United States district attorney and of Mr. Huntley, one of the national commissioners, both of whom were present at the hearing.

Counsel for the complainant having limited his motion to an injunction against the board of directors, it will not be necessary to pass upon the objections that have been made to the issuing of an injunction against the park commissioners.

In disposing of the motion the court can only consider the facts as set forth in the bill of complaint and the intervening petition, they being the only papers presented in support of the motion or in opposition to it.

The intervening petitioner prays for an injunction against the directors to restrain them from opening the fair on Sundays; but at the hearing his counsel stated that they did not desire an injunction, and in their argument confined themselves to the presentation of objections to the injunction prayed for in the bill of complaint.

The complainant filed his bill in a dual capacity, as a stockholder and as a tax payer. His counsel, however, did not press his claims as a stockholder, and rested his argument principally, if not solely upon his rights as a tax payer. It is too clear for argument that as a mere stockholder the complain-

ant cannot maintain this bill. In the absence of fraud, breach of trust or *ultra vires*, neither of which is alleged, a stockholder has no right to interfere with the management of affairs of the exposition by its board of directors.

As a tax payer the complainant claims that because under the act of the legislature of February 24, 1869, the lands and premises to be acquired by the South Park commissioners were "to be held, managed and controlled by them and their successors as a public park for the recreation, health and benefit of the public, and free to all persons forever," it was beyond the power of the park commissioners or the exposition authorities to close the park on Sundays, and that an injunction should issue on that ground alone.

To this view divers objections are made by the intervening petitioner, which will briefly be considered. In the first place it is contended that congress, having sole power and supreme jurisdiction, has enacted a law that the fair shall be closed Sundays. Even if it were true (which it is not) that congress had sole or supreme jurisdiction in the matter in hand, still, in the very first act of congress concerning the exposition and creating the board of national commissioners (approved April 25, 1890), it is provided that "nothing in this act shall be so construed as to override or interfere with the laws of any state." The laws of this state touching the use of the park were therefore expressly left in full force and effect. Nor is it true that congress has passed a law requiring the fair to be closed on Sunday. On the contrary, it has carefully refrained from doing so, probably for the reason that it knew it had no power. What it did was by the act approved August 5, 1892, to make certain appropriations, including the \$2,500,000, "upon the condition that the said exposition shall not be opened to the public on the first day of the week, commonly called Sunday; and if the said appropriations be accepted by * * * the World's Columbian Exposition upon that condition, it shall be and hereby is made the duty of the World's Columbian Exposition * * * to make such rule as * * * shall require the closing of the exposition on * * * Sunday." It was

only by the acceptance of this condition by the exposition board of directors that the clause forbidding Sunday opening became operative. In effect, congress offered them a certain sum of money, provided they would do a certain thing. They accepted the proposition, and thereby entered into a contract with congress. Had they not accepted it the Sunday clause would have been of no force or validity whatever, and would have remained what it was in the first place, a mere offer.

But as the directors did accept the condition, it is claimed that they are bound by it; and the court should not enjoin them from doing what as a matter of sound morals and common honesty they are bound to do. On the other hand, it is urged that the subsequent action of congress has relieved the directors from the obligation of the contract. On March 3, 1893, congress ordered the payment of \$570,808 for awards and certain other purposes, and specifically directed that this sum "shall be a charge against the World's Columbian Exposition and that of the \$2,500,000 appropriated under the act of August 5, 1892, \$570,808 shall be retained by the secretary of the treasury" until the directors shall have furnished to his satisfaction full and adequate security of the repayment by the directors of the sum of \$570,808 on or before October 1, 1893, "and until such security shall have been furnished this appropriation" (meaning the \$570,808), or any portion thereof, shall not be available.

Having in August, 1892, donated to the fair a sum of money upon a certain condition, which was accepted, congress undertook in March following to withhold and has withheld over one-fifth of that sum unless certain security can be furnished by the directors,—a requirement about which nothing was said in August. Congress could not by itself alone change or impair the terms of the contract then entered into. As it takes two to make a contract, so it takes two to unmake it or to change it. The money withheld, over one-fifth, constitutes a substantial part of the original appropriation, and the withholding of it is such a breach of the contract as to relieve the directors from the effect of the Sunday clause, provided they

return what moneys they received before the adoption of the act last March, and have accepted no substantial sum since they learned of its passage. There is nothing before the court to show any acceptance of moneys since the passage of the act.

"This is a Christian nation," says the intervening petitioner, "and Christianity," says his counsel, "is a part of the law of the land;" and therefore the injunction should not be granted. The truth of this proposition, from a legal standpoint, is not beyond doubt, but conceding its correctness, the consequences predicated thereon do not follow. In the bill of rights, being art. 2 of the constitution of Illinois, the people of the state have declared: "The free exercise and enjoyment of religious profession and worship *without discrimination*, shall be forever guaranteed; and preference shall be given by law to any religious denomination or mode of worship." But irrespective of the constitutional provision, grave difficulties present themselves as soon as it is sought to enforce practically the doctrine that the Christian religion is a part of our law. There is a well known Christian sect, the adherents of which believe that Saturday, and not Sunday, is the proper and rightful day of rest and worship; and even among those who regard Sunday as the proper day there are serious differences of opinion as to the manner in which it should be kept. In this, as in other centuries, there are millions of professing Christians, members of churches and congregations, who see no wrong in taking recreation on Sunday. Indeed, they welcome it as a day on which, in addition to religious worship, they have time to breathe the fresh air of the parks and the country, and to listen to the sounds of song and music, and to view and admire the masterpieces of sculpture and painting. Even if Christianity be embedded in the law (which I repeat is not free from doubt), yet it by no means follows that the Christian religion, as practiced by very large numbers of its devout believers, requires the fair to be closed on Sunday.

It is next objected that for the court to grant the injunction asked for would be a violation of the law of the state because

section 317 of our criminal code provides that "whoever disturbs the peace and good order of society by labor or any amusement or diversion on Sunday shall be fined not to exceed \$25." It is *assumed* by the intervening petitioner and his counsel that keeping the fair open Sundays will result in a disturbance of the peace. They make no showing and produce no proof that such will be the case, or that the disturbance, if any, will be greater on that day than on any other. As a citizen, the court, with many others, is of the opinion that under the conditions known to prevail in this community, the opening of the fair on Sundays, instead of disturbing, will directly and powerfully *conduce* to "the peace and good order," and (one may safely add) to the education and elevation of "society."

It is next urged that the United States is a necessary party to the proceeding, but if it were made a party, this court would have no jurisdiction over it. The latter may be conceded, but it does not appear that the government is a necessary or even a proper party. In the case cited by counsel, *Springer v. Rosette*, 47 Ill. 223, the bill was filed to set aside, as a cloud upon the complainant's titles, a certain deed conveying his land to the United States, which had been sold to it by reason of his default in payment of an income tax due from him under the internal revenue law. There, the property rights of the United States were directly involved; here, so far as appears, no property interests of the government are at stake.

Lastly, it is said that the complainant cannot maintain his bill because he has no more interest in the subject matter than any other citizen or tax payer, and therefore the suit should have been brought by some representative of the people, such as the attorney-general or the state's attorney. In support of this contention, counsel cites *City of Chicago v. Union Building Association*, 102 Ill. 379. That was a bill by the association, as a tax payer, and the owner of the building at the southwest corner of Washington and LaSalle streets, to enjoin the city from vacating LaSalle street between Jackson and Van Buren, in order to make room for the erection of the

present board of trade building. The supreme court held that in the absence of a special injury on its part the association could not maintain the bill, and that for any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public. It will be noticed, however, that suit was against a municipal and therefore a public corporation, and not, as here, against a private one. And even there the supreme court referring to many cases previously decided by it, announced as a well established rule that wherever the tax payer has a directed personal interest to be protected, for example, where the public authorities attempt to impose upon him an illegal or unauthorized tax, any one whose property will be affected may enjoin even a public corporation or its officers from collecting the tax. *Chestnutwood v. Hood*, 68 Ill. 132; *Devine v. Board of Commissioners of Cook Co.*, 84 Ill. 590; *City of Springfield v. Edwards*, 84 Ill. 626.

In the present bill it is averred that the complainant has contributed large sums toward the establishment and maintenance of the exposition, and that the closing of the fair on Sunday will operate prejudicially to his pecuniary interests as a stockholder. He has therefore a direct personal interest, to protect which he has filed this bill.

By the act of the legislature providing for the location and maintenance of the south park, the commissioners are to hold and manage the park grounds "subject to such rules and regulations as shall from time to time be adopted by them or their representatives for the well-ordering and regulation of the same." Under this provision, the commissioners may make such rules and regulations as are reasonable and proper to effect the purposes for which the park system was established. It is charged in the bill that the park commissioners and the exposition directors "have agreed to close the whole or a part of the said land upon the first day of each week, commonly called Sunday, and thereby to prevent the admission and recreation to the public of said lands and premises," and that neither the commissioners nor the directors had any right to

enter into any such "agreement." It does not appear that the "agreement" to close the park was entered into in pursuance of any rule or regulation made by the commissioners, or that any rule was made by them regulating the admission to the park on Sunday or any other day. Upon the showing now made, and, even regarding the "agreement" as a rule, the court is not in a position to determine whether it is a reasonable exercise of the powers conferred upon the commissioners. In view of the language of the act that the land shall be a "public park for the recreation, health and benefit of the public, and free to all persons forever," it devolves upon those who claim that the exclusion of the public on Sundays was rightful, to show the reasonableness of the action taken in that regard.

This not having been done, the complainant is entitled on the face of his bill, to a preliminary injunction as prayed for, and it is accordingly ordered to issue upon his giving the usual bond in such sum as may be fixed by the court.

(County Court of Cook County.)

In re Estate of James Lamble, Deceased.

(January 19, 1869.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT OF FOREIGN CONSUL AS ADMINISTRATOR—CONSUL'S PRIVILEGE—NATURE OF WAIVER. An application of a British consul to be appointed administrator of a deceased Englishman should be denied whether he applies as relative, creditor, friend or as consul; even though he agrees to waive his privilege for this, he cannot do it being in his government and not personal to himself.

Petition to be appointed administrator. Heard before Judge James B. Bradwell. The facts are stated in the opinion.

BRADWELL, J.:—

James Lamble, a British subject, died at Chicago on the 14th day of October, 1866, intestate, leaving no creditors or

relatives in the United States, but leaving some money in Chicago. On the 19th of January, 1869, T. Frederick Wilkins, acting British consul, filed his petition and prayed to be appointed administrator of the estate of the said deceased on the ground that he was a *friend* of the deceased subject, and offered to waive his right as consul to object to any process of the court or order entered against him during the settlement of the estate. This court decided, in the case of *Rosenthal v. Burrill*, that where the British consul applied to be appointed administrator on the ground of his being a consul, that he had no standing in court and ought not to be appointed. This case is the same as that of *Rosenthal v. Burrill*, with the exception that the petitioner claims it on the ground of his being a friend and offering to waive his right, etc. I am clear that it makes no difference in what capacity he applies, whether as relative, creditor, *friend* or British consul. If he is a foreign consul, and it so appears, his application should be refused.

The privilege that the consul has to object to the process of the court is not a personal one. It belongs to the government he represents and cannot be waived by him.

The application is refused and the petition dismissed.

NOTE.—See the succeeding case.—Ed.

(County Court of Cook County.)

Francis Wilkins, Acting British Consul,

vs.

Julius Rosenthal, Public Administrator

(1866.)

**EXECUTORS AND ADMINISTRATORS—ENGLISHMAN DYING IN ILLINOIS—
APPOINTMENT OF ADMINISTRATOR—BRITISH CONSUL—PUBLIC AD-
MINISTRATOR—ILLINOIS LAW.** When an Englishman dies in Illi-
nois, leaving property and neither relatives nor creditors here,
not the British consul, but the public administrator is the

proper party to be appointed administrator, because the former is not amenable to the process of the court, and the latter is the one designated under the Illinois laws which alone control; neither Congress nor the English law have anything to do with the matter.

Petition to be appointed administrator. Heard before Judge James B. Bradwell. The facts are stated in the opinion.

Messrs. Hervey Anthony & Galt, for petitioner.

Messrs. Rosenthal & Pence, for public administrator.

BRADWELL, J.:—

William Burrill, a British subject, died at Chicago, Illinois, on the 15th day of July, A. D. 1863, leaving neither relatives nor creditors in this state, but leaving money on deposit in the State Savings' Institution, of Chicago, which the bank has refused to pay to her Britannic majesty's consul, on demand made for that purpose, but expressed its willingness to pay the same to any administrator of said state appointed by this court.

On the 24th of October, A. D. 1866, the said Francis Wilkins filed his petition in this court, and prayed to be appointed administrator of said estate upon the sole ground of his being "acting British consul." On the same day, Julius Rosenthal filed his petition in this court, resisting the petition of the British consul, and prayed to be appointed administrator of said estate on the ground that he was public administrator, and that deceased left no relatives or creditors in this state.

In order to properly determine this case, it will be necessary to understand the duties of a consul in regard to the settlement of an estate where the parties interested are subjects of the government from which he is sent; and also to examine the statute of this state in regard to the appointment of administrators.

It is the duty of a consul to look after the interests of the subjects of his own government in the foreign government to which he is sent, and when called upon, to aid with all his pow-

er, such subjects in getting their legal rights, and when property is left in such foreign country, belonging to such foreign subjects, with no one to look after it, it then becomes his duty to see that it is properly cared for, so far as permitted by the local law, and to act, for the time being, as the national agent or attorney of such absent subjects.

According to the general law of nations, it is not the duty of a consul, in case of the death of a subject of his government in the foreign country to which he is sent, leaving personal assets in such country, to do more than he can as consul, under the local law, and whatever he does in the premises must be done by virtue of his office as consul, and not as an officer of a foreign probate court.

In the absence of an express statute conferring the power, wherever a consul seeks to become an administrator, and an officer of a court of a foreign government, he lowers the dignity of his office and government, and is acting out of the line of his duty; it being his duty to watch over the interests of the absent heirs of the deceased, who are subjects of his own government, and when administration is necessary, not to take it himself, but to aid the administrator of the foreign court to do his duty.

Can it be claimed that the court should appoint a British consul administrator today, and when, if tomorrow he should fail to perform his duty, the court should order him to proceed and, upon his refusal, an order to show cause why he should not be attached should be entered, he would have the right to come in and say, "I am her Britannic majesty's consul in Chicago, Ill., and you have no right or power to order me to do anything; you cannot attach me. I defy the probate courts of America to deal with me."

An administrator should never be appointed who cannot be made to feel the power of the court that appoints him, for a willful neglect of his duty. We have thus far spoken of the duties of a consul, in general, under the law of nations, without regard to the acts of congress, the acts of parliament, or the decisions of the English courts. An act of congress on

the powers of consuls, passed 1792, provides that when the laws of the country permit, it shall be the duty of consuls to take possession of the personal estate left by any citizen of the United States who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take charge of his effects, collect the debts due to the deceased in the country where he died, and pay the debts due from his estate, which he shall have there contracted, and at the expiration of one year from his decease shall transmit the residue to the treasury of the United States. But, if, at any time before such transmission, the legal representatives of the deceased shall appear and demand his effects in their hands, they shall deliver them up. By the act of August, 1856, it is provided that it shall be the duty of consuls, so far as the laws of the country will permit, to protect the property of the deceased from any interference of the local authorities of the country where such citizen shall die. As to the power of consuls under this act, see the very able opinion given by attorney-general Cushing, 7 vol. Opin. 242. Under the act of 1792, cited above, Col. Aspinwall, the American consul-general, applied to the English ecclesiastical court to be appointed administrator on the estate of John Hammond, a citizen of the United States, who died in England, leaving personal assets there.

In delivering the opinion of the court, Sir Herbert Jenner said: "It appears that, on the death of Mr. Hammond, Col. Aspinwall, the American consul in this country, took possession of the property about him, paid his funeral and other necessary expenses, but upon application to Messrs. Baring & Co., they declined to pay over the money in their hands until letters of administration were taken out and they could obtain a valid discharge. * * * I am not aware of any case in which it has been held that, by the law of this country, it is competent to a foreign consul to take possession of the property of a foreigner dying here *in itinere*, domiciled in his own country. * * * Is it then the law and practice of this court that such an administration should be granted? I apprehend

not, and that the Crown is the party to see that the property of any person dying in its dominion gets into proper hands. It has been said that by the law of the United States, British consuls may take possession of the property of British subjects in similar circumstances. But this is not by the law of nations, but by custom or by express enactment, and is not a law that this country is bound to follow; this country has not adopted the principle of reciprocity in this respect. I am of opinion that there is not sufficient evidence to show that the administration ought to be granted as prayed to Col. Aspinwall, and I reject his petition. No claim is made by the Crown." *Aspinwall v. The Queen's Proctor*, 2 Cur. Ecc. 248.

The following authorities sustain the doctrines as laid down in the above case: *In the goods of Beggia*, 1 Add. Ecc. 340; *In the goods of Peter R. Wyckoff*, 3 Sw. & Tr. 20; Dood and Brooks, Probate Practice, 415, and note (q) Cootes' Probate Practice (5th edition), 130; *The Public Administrator v. Hughes*, 1 Bradf. 125; *Ferrie v. The Public Administrator*, 3 Bradf. 249, 265.

The British statutes of 1861, in regard to the right of foreign consuls to administer upon the estates of subjects of their governments dying in England, is as follows:

"SECTION 4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty, by order in council, to direct; and from and after the publication of such order in the *London Gazette*, it shall be and is hereby enacted that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice consul, or consular agent of such foreign state, within that part of her majesty's domains where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and

to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice consul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person limited in such manner and for such time as to such court shall seem fit."

The power to say who shall administer upon the estate of a British subject found in our state is not the British government, nor congress.

In fact, congress has no constitutional power to say who shall be an administrator in such a case, nor to enter into a valid convention with her Britannic majesty for the purpose providing for the appointment of her consuls as administrators by our probate courts.

It is a power vested exclusively in the people of the state of Illinois, and the people have, through their legislature, provided that in case a non-resident dies and leaves estate in this state, and no next of kin, or creditors, that the public administrator shall be appointed administrator of such estate, and having said nothing of the British consul, or any other consul, I agree fully with the English court, "*that this state has not adopted the principle of reciprocity in this respect,*" and that to appoint the British consul would be against the policy of our state government and its express statute, and that until the legislature shall provide otherwise in case of the death of any non-resident leaving property, but no relatives or creditors in this state, that the public administrator "*is the party to see that such property gets into proper hands.*"

The petition of the acting British consul is therefore dismissed at his cost, and administration granted to the public administrator.

NOTE.—See the preceding case.—Ed.

(Recorder's Court of Chicago.)

Crangle

vs.

Sloucen

(September, 1869.)

1. **CONTEMPT—REPLEVIN—TAKING PROPERTY FROM PLAINTIFF.** Where a defendant from whom property has been taken under a replevin writ, pending the replevin proceedings, takes the property away from the plaintiff to whom the sheriff has delivered it, he is guilty of a contempt of court.
2. **SAME—DEFENSE—AVOIDING PROSECUTION FOR NON-COMPLIANCE WITH PUBLIC RULES—WRIT OF COURT, PROTECTION.** The defendant cannot set up in a contempt proceeding for retaking property delivered under a replevin writ that the property is a house which the defendant had been moving in the streets, and that to leave the house would subject him to prosecution for obstructing the public streets contrary to the permit to move which he had received from the board of public works, as the replevin writ being from a court of competent jurisdiction would be a complete defense in such case.

Application for contempt attachment. Heard before Judge Wm. K. McAllister. The facts are stated in the opinion.

MCALLISTER, J. :—

This is an application for an attachment to punish the defendant in a civil suit for contempt. On the 29th day of August last, the plaintiff sued out of this court a writ of replevin against defendant for a house then on rollers in the street. The affidavit is sufficient and the usual bond was given to the sheriff, about noon of that day (being Saturday), the writ was executed by the sheriff taking the property from defendant and delivering the same to plaintiff, and serving the writ on defendant. On Sunday night next following, or early Monday morning, the defendant resumed possession of the property and moved on to the lot where he originally intended to take it, and has ever since had the control of it.

And the question arises: Is this a *rescue* of the property specified in the writ, whereby the sheriff was commanded to take this property and deliver it to the plaintiff, so as to constitute the act a contempt of court? The defendant's counsel urge two points of defense.

1st. That the property having been replevied and delivered to the plaintiff, it was thereafter in his custody and not in the custody of the law, and that therefore the only remedy of the plaintiff is by another action as against a trespasser. 2nd. That because defendant had obtained a permit of the board of public works to move the building, he was compelled to complete the removal or be subject to prosecution for obstructing the streets. Upon the first point defendant's counsel cite the case of the *People ex rel. Wilder, Sheriff, etc. v. Church*, 2 Wend. 261. This authority is so far as it applies at all against the defendant. The case was a motion by the sheriff for an attachment against Church who was an imprisoned debtor, on jail limits. Church was exhibiting a gold watch in a bar room to an attorney, boasting of its value. The attorney took it, and handed it to a deputy sheriff present, who had an execution for \$150 against Church. The deputy advertised the watch for sale and on the day of sale it was passed around for inspection, when Church snatched it from the hands of a spectator and walked off with it. The court, Marcy, J., says: "This is not a case in which the court will grant an attachment. An attachment, will issue for a *rescue* on *mesne*, but not on *final* process. The sheriff possessed as much power as the court can give him by the issuing of an attachment. He might have commanded what force he wanted to prevent the carrying off of the watch. Besides he is entitled to his action against the defendant." When the court stated that it would not grant an attachment for a rescue under *final* process it meant in such a case as that, where the recovery was for damages, and the court loses jurisdiction of the defendant, by the judgment; but in ejectment where the judgment awards the possession to the plaintiff, it will grant an attachment, for rescue under final process. A writ of replevin however

is *mesne* process. The rescue in this case was not from the sheriff after he had taken the property by the writ, and before the delivery of it to plaintiff; but from the plaintiff himself after it had been delivered to him. The writ has not been returned into court and it not returnable until next month. Then does the rescue from the plaintiff himself constitute a contempt of court? The property was delivered to the plaintiff lawfully, and solely by virtue of the writ; and if he hold it until the determination of the suit he holds it by the writ. He has given bonds for its return if return be awarded, as between the parties to the suit, the property in the hands of the plaintiff was in the custody of the law, and could not have been taken out of his possession, unless the writ had been sued out by him fraudulently, and as a cover to defendant's property even by an execution against defendant, *Rhines v. Phelps*, 8 Ill. (3 Gil.) 455, 464. Neither could the defendant repossess himself of the property, by suing out a writ of replevin for it against the plaintiff. In *Morris v. DeWitt*, 5 Wend. 71, the defendant in a replevin suit caused a writ to be issued in his own behalf for the same property; but the court on motion superseded his writ with costs. The circumstances of the *rescue* being from the plaintiff himself is no answer. In a case of a plaintiff having been put in possession by a writ of possession in ejectment and a rescue made by the defendant, it is not from the officer but the party. In such a case the court will issue an attachment for contempt. And the principle is precisely analogous. In *United States v. Slaymaker*, 4 Wash. C. C. 170,¹ the court says: "For if, after he is put into possession, and the officer has departed, he is again turned out by the defendant, he may upon a suggestion, *vice comes non misit breve* obtain an *attachment*, or sue out a new *habere facias possessionem*, so as to regain the possession. If he is turned out by a *stranger* the rule is otherwise, for he is then put to his ejectment or to his writ of forcible entry and detainer; because in the latter case the title never was tried in respect to a stranger." A replevy bond operates as a judgment until

¹ Fed. Cas. 16,313.—Ed.

breach of its condition. *Hagan v. Lucas*, 10 Pet. 400. Let us consider what would be the effect upon the rights of the plaintiff, if the court is powerless to protect him in his possession under the writ. This house when severed from the realty is personal property and subject to a writ of replevin; but so soon as it again becomes permanently annexed to realty it ceases to be personal and becomes real property, and therefore beyond the reach of a writ of replevin. *Ogen v. Stock*, 34 Ill. 522. The facts show that it has already been placed upon another lot whether permanently annexed or not is not shown. Suppose it has as it might be, then the plaintiff could not take it either by the same or an *alias* writ. He goes to trial and perchance proves it to be his property and has a recovery accordingly. The property having been taken and delivered to him, he cannot recover the value of the property, but only the damages for being deprived of it from the time of defendant's capture of it in the first instance. He can not add a count in trover in his declaration because the property was found and delivered to him. His only remedy would be if he have any by another action of trespass or trover for this rescue, to recover not the specific property, but damages. Suppose you take a favorite family picture to an artist to be copied, and he refusing to deliver it back, you replevy it; as soon as delivered to you by the officer, the artist seizes it by force, makes off with it, and conceals it. Are you to be thus defeated in gaining possession of that which is of little money value in market, but of incomparable value to you, and put to your action of trover or trespass for damages? But if the article have great intrinsic value, how is it then? The action of replevin is frequently resorted to when property has been wrongfully taken or detained, because the guilty party is insolvent. If he can thus rescue the property and the court is powerless to compel him to restore it, then the writ is wholly useless, a valuable legal right is taken away by a party's own wrongful act and insolvency becomes both a sword and shield.

The second point made by the defendant is wholly untenable. It is a pretext and nothing more. Any good lawyer

would have told him that he could not be held liable for not doing that which he was prevented from doing by the writ of a court having jurisdiction of the subject matter. And it is a singular fact too that he continued to move the house until he got it on the very spot to which he originally intended to convey it. Therefore it is considered by the court that the defendant in receiving the property in question from the plaintiff after it had been delivered to the latter by the sheriff is guilty of a contempt for which it is adjudged that he pay to the plaintiff a fine of one hundred dollars and the costs of this proceeding, and also that the defendant be committed to the Cook county jail until such fine is paid and until he restores to the plaintiff the property rescued.

(Circuit Court of Cook County. In Chancery.)

Glover

vs.

Couch, et al.

Rice

vs.

Couch, et al.

Couch

vs.

Glover, et al.

(May 26, 1889.)

1. **RECEIVERS—APPOINTMENT OF—POWER OF COURT OF EQUITY.** There is no doubt as to the power of a court of equity, pending litigation to take the possession of property from persons holding the legal title by appointing a receiver to hold and control the same until the controversy is finally decided.
2. **SAME—PRINCIPLES GOVERNING.** The power to appoint a receiver is one which the court exercises with reluctance and with great caution. It does so only to preserve the property for the benefit of the party who may be entitled to it.

3. EQUITY—MAXIM—PROOF OF FRAUD. Equity imputes good faith rather than bad faith. Fraud must not only be alleged; it must be proven.
4. EQUITY—FIDUCIARY RELATIONS—TERMINATION OF—CONSTRUCTIVE TRUST—FRAUD. Where the defendants have occupied a fiduciary relationship toward the complaining party and by reason thereof obtain his consent to the sale of certain of his property and the defendants buy in this property at the resultant sale, it is too late for them to claim that the fiduciary relationship has terminated and the property which they have obtained in this way, if still in their hands, will be impressed in a court of equity with a constructive trust in favor of the complaining party or his creditors. In such a case it is not necessary to show actual fraud; the law presumes fraud when the relationship is shown.
5. RECEIVER—APPOINTMENT ON MOTION—SUFFICIENCY OF EVIDENCE. On motion to appoint a receiver, it is not necessary for the complainant to show absolutely that he will ultimately prove his case; it is only necessary to show a strong probability that he will finally be entitled to a decree against the defendants.

Creditor's bill and cross bill. Motion to appoint receiver. Heard before Judge Murray F. Tuley. The facts are stated in the opinion.

TULEY, J.:—

The cross bill of James Couch contains a very voluminous history of the transactions out of which this litigation has arisen. The main facts alleged are that in 1875, James Couch was the lessee of the Tremont House in this city, holding a ten years' lease, which was afterwards, by agreement, to terminate in 1880, and also owned all the furniture therein, which cost some \$200,000. That in the year 1875 the defendant, Dupree became his legal, and the defendant, Chumasero, his confidential financial adviser. That these two defendants having through these fiduciary relations acquired an undue influence and control over Couch, then about eighty years of age, devised early in 1879 a fraudulent scheme to obtain possession of the hotel and the ownership of the furniture for their own profit and advantage. That to that end they induced Couch to

agree to surrender his lease, then having over a year to run, to John A. Rice (also a defendant), and to consent to a new lease to Rice for five years, and to a sale of the furniture under the chattel mortgage securing a debt of \$50,000 which was then upon it; the said Dupee and Chumasero to buy it in, sell one half to Rice and out of the profits of the hotel to pay whatever remained unpaid upon that part of the mortgage debt which it was expected to have extended; also to pay out of such profits the debts of said Couch, if any, which it might become necessary to discharge; and at the end of the five years to turn over the hotel and one half interest in the furniture to Couch. That for that purpose Couch furnished about \$20,000 to be paid as purchase money on the sale that was to be had.

That the lease of Couch was surrendered, a new lease made to Rice for five years and the furniture sold under the chattel mortgage to the bookkeeper of the hotel for the amount of the mortgage debt. That a new mortgage was made for \$40,000 and the balance, \$15,502.92 paid in cash. That immediately Gregg the bookkeeper made a bill of sale to Dupee and Chumasero. That Rice contributed \$3,000 of the cash paid, under a previous agreement made between Rice and Dupee and Chumasero, to the effect that he, Rice, should furnish that amount towards the purchase, and upon payment of one half the amount that it might be purchased for, he was to receive a bill of sale of such half; and also that the furniture if purchased, should remain in the hotel and the net profits of the hotel should be divided one half to Rice and one quarter to each Dupee and Chumasero.

The tripartite agreement also in substance provided that if the furniture should not be purchased at the sale, Rice should be assisted by the other parties to buy new furniture to take the place of the old. It also contained certain provisions for the board of Couch and family during the term of the lease and the payment to Couch of \$25.00 per week for his services.

That large profits have been made since then, January,

1879, by which not only has the \$40,000 been paid, but many thousands of dollars besides received, which Rice, Dupee and Chumasero have appropriated to their own use, and now deny that Couch has any interest in the furniture or in the profits of the hotel or that any such agreement as alleged by Couch was ever made.

The cross bill and the creditors' bills seek to have the sale of the furniture declared void and for an accounting. The allegations of the cross bill would probably if sustained, justify a decree that the defendants, Rice, Dupee and Chumasero held as trustees and are liable to account as such.

The defendants deny substantially all the allegations of the complainants, particularly and in detail all charges of fraud, Dupee and Chumasero in substance alleging that Couch was insolvent, that it was impossible for Couch to get an extension as to his debts, or to continue business, that it was only a question as to which creditors should get a preference as to the small amount of assets that Couch had in his control. That they were creditors—Dupee as a member of his firm of Hitchcock, Dupee and Judah, to the amount of \$5,275, and Chumasero to the amount of \$5,000—and that all moneys, notes, etc., turned over to them was in payment of their debts and insufficient to pay the same. Also that their fiduciary relations to Couch having ceased, they had as much if not a better right to a preference than any other creditor, and as to the purchase of the furniture that they bought in good faith at a public sale and had as much right to buy as any other person. That they, being instrumental in obtaining the loan of \$50,000 to be made to Couch, were under a moral obligation to see that the money should be made on the mortgage sale.

The defendants deny any agreement with Couch or that any trust relations exist now or did exist when the lease or furniture was acquired, and deny that the same were acquired for the benefit of Couch or his creditors, or with any such understanding or agreement.

The legal title to the lease is in John A. Rice and the legal

title to the furniture is as to one half in Rice and the other half in Dupee and Chumasero.

Couch claims to be the equitable owner of the lease and of the whole or at least one half of the furniture while the creditors of Couch claim that they have the right to have the furniture and the profits received by Dupee and Chumasero applied in satisfaction of their debts.

A receiver of the lease and furniture is moved for as against defendants, Rice, Dupee and Chumasero.

While there is no doubt as to the power of the court pending litigation to take the possession of property from persons in whom the legal title is vested, by appointing a receiver to hold and control the same until the controversy concerning it is finally determined, yet the power is one the court exercises with reluctance, and with great caution. It does so only to preserve the property for the benefit of the party who may be found entitled to it.

Feeling the grave responsibility cast upon the court by this motion for the exercise of this power, I have carefully read over the evidence submitted and have reached a conclusion only after mature reflection. I shall not comment upon the evidence submitted. As there must hereafter be a final hearing of the cause, it would not be proper for me, on this motion, to review the evidence. I shall therefore announce my conclusions so far only as I deem necessary for the decision of this motion.

I have not been able to reach the conclusion that there is a probability that the complainants will ultimately be entitled to a decree as against the defendant, John A. Rice.

If the complainants succeed ultimately in establishing the fact that there was a fraudulent scheme or conspiracy on the part of Dupee and Chumasero as alleged in the bills of complaint, the evidence now produced fails to satisfy me that Rice was a party thereto or that he acted with knowledge of any such scheme or conspiracy.

He occupied no fiduciary relation to Couch, and in making

the contract which he did with Dupee and Chumasero, I am not now prepared to say that he acted with the intent to defraud Mr. Couch or to aid the other defendants to defraud either Couch or his creditors. Equity imputes good faith rather than bad faith. Fraud must not only be alleged but it must be proven as against the defendant Rice.

As to the defendants Dupee and Chumasero, I do not deem it necessary at this time to express any opinion as to whether the proofs sustain or fail to sustain the charges of fraud and fraudulent conspiracy set out in the bills of complaint.

Nor is it necessary to now decide whether the evidence shows them to be in possession of the property upon the express trusts of the agreement alleged to have been made with Couch, or as trustees *ex maleficio* by reason of an alleged undue influence and control over James Couch, or by reason of having used the alleged agreement to buy in and hold the property as a means to carry out their preconceived intention to obtain the legal title and defraud both Couch and his creditors as alleged in Couch's bill of complaint.

I deem it sufficient to say that in my opinion the evidence tends strongly to prove that at the time when Dupee and Chumasero conceived and had partly consummated their scheme of having a chattel mortgage sale made of the furniture and buying it in, in their own name and for their own use and benefit, and of having an agreement or understanding with Rice to the effect that he, Rice, should furnish a part of the purchase money and have an interest therein, that the same when purchased should remain in use in the hotel for the period of the lease obtained or about to be obtained by Rice, they, Dupee and Chumasero, to receive one half the net profits of the hotel during such lease—they occupied such fiduciary relations towards Couch, and had acquired such influence over him by reason of such relations that equity will impress a constructive trust upon the property purchased and the profits realized therefrom in favor of Couch as the party

beneficially entitled thereto. It was too late for Dupee and Chumasero to terminate those relations and avoid the effects of their having existed between the parties.

I believe this would be the case whether the defendants, Dupee and Chumasero intended any fraud or not.

While it is true that in some cases persons occupying fiduciary relations may contract with the *cestui que use*, as to the property connected with such relations or may under certain circumstances become the owners thereof; yet I am of the opinion from the evidence presented, that considering the peculiar circumstances of this case, the embarrassed condition of Couch's matters, his extreme old age, the great influence and control which these parties had obtained over him, the intimate and close trust and confidential relations existing between them and Couch, there is a strong probability that complainant Couch will be entitled to a decree—that as against him they cannot hold, and that it would be unconscientious to permit them to retain the property purchased or the profits realized therefrom.

Being of this opinion, the property being of great value with large profits accruing therefrom and Dupee and Chumasero claiming to own the same in their own right, I hold that a receiver should be appointed as to their undivided one half interest in the furniture and as to the profits arising under the contract with Rice in order that the same may be preserved for the party that shall ultimately be found entitled thereto.

(Circuit Court of Cook County.)

The People

vs.

Adsit, et al.

(1868.)

BAIL—ADMISSION TO—POWER OF COURT OF ANOTHER CIRCUIT—ARREST ON INDICTMENT. A court of another circuit than that in which a prisoner has been indicted and is held in custody has no power to admit him to bail.

Habeas corpus. Heard before Judge Erastus S. Williams.

Adsit and Abbey were indicted in the Kane county circuit court, charged with obtaining the conveyance to themselves of a farm, by false pretences. A capias was issued, and they were arrested by the sheriff of that county. No order for the taking of bail was made by the circuit court of Kane county, and the defendants were lodged in jail at Geneva. They sued out a writ of *habeas corpus* from the circuit court of Cook county, asking to be let to bail, and setting up the illness and inability to act of the judge of the Kane circuit, as a reason for applying to the circuit court of Cook county.

Judge J. G. Wilson appeared in opposition to the application, and suggested a doubt as to the power of the circuit court of Cook county to admit the petitioners to bail. He reviewed the provisions of the statutes, and claimed that the only provision in relation to the taking of bail, *after indictment found*, is the 175th section of the criminal code, which provides as follows: "It shall be the duty of the circuit court, when any indictment shall be found as a true bill, to make an order, fixing the amount of bail to each offence bailable by law, to be endorsed on the process of the clerk." He claimed that the 206th section applies only to the cases of persons committed to jail on a criminal charge for want of bail after a hearing by an examining magistrate; in which cases any judge or two justices may take bail. He also cited the acts of congress of 1789 and 1793, which provide that in case of the absence from a district of a judge of the United States district court, a judge of a state court, mayor of a city, etc., may take bail; and he claimed that this was in the nature of a legislative construction, that, in the absence of such a provision, no other court or tribunal would have power to admit to bail.

He referred to the fact that the court of king's bench, in England, as the superior court of the realm, and having the control of all superior courts, exercised the power to admit to bail in all cases where the inferior court had failed to do so; that under our system circuit courts are of equal dignity

and power, and each the superior court within its jurisdictional limits. He also quoted the remark of Lord Bacon, "It is a general rule that *whosoever may judge of the offense* may bail the offender," and claimed that as the indictment is pending in another circuit, the circuit court of Cook county has no jurisdiction to try and determine the case, and therefore may not take bail.

Mr. Pulver for the petitioners urged the great hardship in this, as well as other similar cases that might arise, if the law as claimed by Judge Wilson was to prevail, and urged that the court under the circumstances ought to interpose and admit the petitioners to bail.

Judge Williams, in delivering his opinion, remarked that the question presented was a new one, and he had suggested to the petitioners' counsel at the time of allowing the writ, his doubts as to the power of the court to take the desired action. He said as the case stood it was one of great hardship, and it was his duty to admit the defendants to bail if, under the law, he was authorized to do so. On the other hand, the people were entitled to have legal and competent bail, and if he were to act without authority the bail would be unavailing. Upon such examination as he had been able to give the question, his doubts as to the power of the court to act were only strengthened, and he felt it to be his duty to deny the prayer of the petition and remand the prisoners into the custody of the sheriff of Kane county.

(Circuit Court of Cook County.)

The People of the State of Illinois

vs.

Edgar A. Potter and Fred More

(No. 3760, Criminal carelessness; No. 3761, Manslaughter.)

Same

vs.

Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell, Peter S. Grosscup and Fred More.
(No. 3762, Manslaughter; No. 3763, Criminal carelessness.)¹

Same

vs.

Charles Botts

(No. 3764. Manslaughter.)

Same

vs.

Ben McClara

(No. 3765. Manslaughter.)

(February 28, 1908.)

1. **CRIMINAL CARELESSNESS WHILE IN CHARGE OR CONTROL OF PUBLIC CONVEYANCE—LIABILITY OF OFFICERS AND DIRECTORS OF RAILROAD.** Section 49 of the criminal code which makes it an offense for any person having personal management or control of or over any public conveyance used for the common carriage of passengers, to be guilty of gross carelessness or neglect in or in relation to the conduct, management or control of such public conveyance, while being used for the common carriage of passengers, whereby the safety of any person shall be endangered, has no application to persons having the management or control of the *business* of a railroad, such as the officers and directors.

(See note 1, p. 412.)

¹ Indictments Nos. 3700, 3710, 3713, 3714, 3741, 3742 and 3743 were nolledd on account of the pendency of the second series of indictments.—Ed.

2. **INDICTMENT—MISJOINDER—CHARGING DIFFERENT DEFENDANTS IN SEPARATE COUNTS.** An indictment against a number of defendants cannot charge part of the defendants in one count and part of them in other counts. Therefore, an indictment which charges the directors of a corporation in some counts and the officers in other counts must be quashed.
(See note 2, p. 413.)
3. **INDICTMENT—MISJOINDER OF DEFENDANTS IN INDICTMENT FOR NEGLIGENCE OF DUTY, NOT JOINT.** In indictments for manslaughter and criminal carelessness arising out of an alleged neglect of duty, it is erroneous to join the defendants upon whom the obligation to perform the alleged duty rests, unless it is shown by a proper and specific averment of fact that such duty rested on all of the defendants alike. Where the board of directors of a corporation were indicted jointly with the officers and the superintendent of a railroad for negligence in the operation of the road, whereby a collision occurred resulting in the death of a passenger, it was held that as no joint duty was alleged that the misjoinder was fatal.
(See note 3, p. 414.)
4. **DIRECTORS OF CORPORATIONS—CRIMINAL LIABILITY OF FOR NEGLIGENCE OF DUTY.** The directors of a railroad corporation may be criminally liable in certain cases of neglect of duty. But they cannot be held criminally liable jointly with the superintendent or general manager of such road who negligently or wilfully give orders which result in a wreck, or with the motor man who negligently or wilfully runs one car into another, either in obedience to or in direct violation of those orders.
(See note 4, p. 415.)
5. **INDICTMENT—DUPLICITY IN—EACH COUNT MUST CONTAIN SINGLE ISSUE.** An indictment should be certain and specific as to the defendants, the offense, and the manner of its commission, so that the plea of "not guilty" will raise a single issue upon each count. If more than one issue is raised upon any count by that plea, the count is duplicitous.
6. **INDICTMENT—DUPLICITY IN—WHAT CONSTITUTES.** A count of an indictment for manslaughter against the directors and officers of a railroad which alleges that a death was caused in the operation of the railroad by a failure to provide safe, proper and sufficient rules for the operation and running of cars and also charges that the death was caused by the establishment and enforcement of unsafe, improper and insufficient rules and regulations, is bad for duplicity.
7. **INDICTMENT—ALLEGATIONS OF, AS TO DUTY.** An indictment based on a neglect to perform a particular duty should allege the

existence of facts from which the law raises the duty, and it is not sufficient to allege that it was the duty to do the things in question.

8. **INDICTMENT—BASED ON FAILURE TO ESTABLISH PROPER AND SUFFICIENT RULES FOR OPERATION OF RAILROAD—MUST SET OUT RULES.** Where an indictment charges manslaughter on account of a death in a railroad collision, alleged to have been occasioned by providing and enforcing improper, insufficient and unsafe rules, the indictment must allege what rules were violated and the rules must be set out in the indictment.
9. **PROXIMATE CAUSE—CAUSAL CONNECTION BETWEEN ACT AND DEATH.** Where it is alleged in an indictment for manslaughter that a collision was occasioned by neglect to provide and enforce safe and sufficient rules and by the enforcement of unsafe and insufficient rules, whereby death was caused, the allegations of the indictment must show a causal connection between the act and the death.
10. **DIRECTORS—CRIMINAL LIABILITY OF WHERE NO CIVIL LIABILITY.** Directors of a corporation cannot be held criminally liable for negligence in a case where they could not be held civilly liable. The person or persons directly responsible for a death are criminally liable.
(See note 6, p. 422.)
11. **CRIMINAL LAW—PRINCIPAL OR MASTER NOT CRIMINALLY RESPONSIBLE FOR NEGLIGENCE OF AGENT OR SERVANT.** A principal or master is not responsible criminally for the negligent acts of his agents or servants.
(See note 5, p. 420.)
12. **GRAND JURY—VALIDITY OF WHERE IMPROPERLY SERVED.** The fact that the sheriff serves a number of the grand jurors by mailing a copy of the venire with a return card to himself in which the grand juror acknowledged service, will not invalidate the proceedings of such grand jury where all the jurors were present even though such service was not in accord with the statute.
13. **SAME—FAILURE TO CERTIFY SELECTION OF JURORS WITHIN FIVE DAYS.** The failure of the county clerk to certify the names of the grand jurors to the clerk of the court within five days after their selection, as required by the statute, does not invalidate the proceedings of such grand jury, as the provision of the statute is directory only.
14. **GRAND JURY—NECESSITY OF HEARING EVIDENCE ON FINDING OF SECOND INDICTMENT.** Where the grand jury hears evidence in support of an indictment, and thereafter at the request of the prosecutor finds a second indictment against the same

person for the same offense, it is not necessary for such grand jury to hear evidence in support of the second indictment.

(See note 7, p. 424.)

15. GRAND JURY—WITNESS NOT SWORN BY FOREMAN—EFFECT OF. Although the statute contemplates that the foreman should swear all witnesses, a failure to do so in the case of a particular witness, will not invalidate the indictment if there is other sufficient evidence.
16. INDICTMENTS—PRESENCE OF STATE'S ATTORNEY IN GRAND JURY ROOM. The state's attorney is not authorized to be in the grand jury room during the deliberations of the grand jury. But the state's attorney may properly be with the grand jury and advise and counsel with them as to their duties, so long as he does not prevail upon the grand jury to return an indictment which they would otherwise not have done.
17. GRAND JURY—EFFECT OF RECONVENING AFTER ADJOURNMENT WITHOUT ENTRY OF RECONVENING ORDER—VALIDITY OF INDICTMENTS. Where a grand jury adjourns for the term *sine die*, and thereafter reconvenes during the same term without the entry by the court of a reconvening order, and returns indictments, such indictments must be quashed as the grand jury was without authority to act.
18. SAME—POWER OF COURT TO RECALL GRAND JURY AFTER ADJOURNMENT. The court has no power to reassemble the grand jury after it has adjourned for the term, except under the provisions of the statute which provides for a special venire.

Motion to quash indictments for manslaughter and criminal carelessness. Heard before Judge Morton W. Thompson.

John McNutt, state's attorney, for the people.

Levy Mayer, Chicago, Ill., *W. S. Graham*, Springfield, Ill.

John H. Marshall, Charleston, Ill., and *Messrs. Andrews & Vause*, Mattoon, Ill., for defendants Potter, Peabody, Underwood, Sampsel, Grosseup and More.

Messrs. Andrews & Vause, for defendant Botts.

Albert C. Anderson and *Charles C. Lee*, Charleston, Ill., and *Edward C. Craig*, Mattoon, Ill., for defendant McClara.

STATEMENT OF FACTS.

The defendants, Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsel, and Peter S. Grosseup, were the directors of the Mattoon City Railway Com-

pany which operated an interurban line of railway between the cities of Mattoon and Charleston, Illinois. The defendant Edgar A. Potter, was the president and general manager of the company, and the defendant Fred More, the general superintendent. The defendants Charles Botts and Ben McClara, were motormen in the employ of the company. On August 30, 1907, a collision occurred between a freight motor car and a passenger motor car which were proceeding in opposite directions on a single track, whereby sixteen persons were killed, and a large number injured.

On September 11, 1907 the board of supervisors of Coles county selected twenty-three persons to serve as grand jurors for the county of Coles at the October, 1907, term of the circuit court, and the county clerk was directed to certify the names of the persons selected to the clerk of the circuit court, pursuant to the statute. The clerk did so certify on September 18, 1907. The clerk of the circuit court thereupon issued a venire for the said grand jurors and placed the same in the hands of the sheriff. The sheriff served several of the grand jurors in person but the service on a number of such grand jurors was had by depositing in the mail an envelope properly addressed to said persons, postage prepaid, containing a copy of the summons and a return postal card addressed to the sheriff and upon which the recipient was directed to acknowledge receipt of the summons. All of said cards were signed and returned to the sheriff.

On October 14, 1907, the grand jurors appeared in the court house at Charleston and were duly impanelled as the grand jury and thereafter retired to their room and after hearing evidence, returned six indictments against the defendants for manslaughter and criminal carelessness.

On October 30, 1907, the said grand jury reported to the court that they had no further business and the court thereupon ordered said grand jury to take an indefinite recess and instructed them that if the court should require their further service they would be notified.

On December 9, 1907, the sheriff mailed to each member

of said grand jury a postal card upon which appeared the following:

“By order of the judge of the circuit court, the grand jury will reconvene on Monday, January 6, 1908, at 1 p. m.

“E. H. Slover, Sheriff.”

No order was entered of record by the court reconvening said grand jury.

On January 6, 1908, the said grand jury assembled. It was charged that the state's attorney thereupon appeared before said grand jury and went with them into the grand jury room and told such grand jurors that he feared that the indictments found in October were not good and that therefore he had drawn new indictments, and that he wanted them to adopt the new indictments and vote on the same; that said indictments were already prepared and said state's attorney presented the same to the grand jurors and requested them to adopt the same and said state's attorney remained in the grand jury room until the said grand jurors did vote upon the said indictments. The grand jury thereupon returned six additional indictments against the defendants. Upon the hearing of the motions to quash, the defendants moved to quash the first series of indictments on account of the pendency of the second series. The state's attorney thereupon nollied the first series of indictments and the motions to quash the second series were thereupon argued.

Indictment No. 3762 for manslaughter contained twenty-two counts. Count one alleged:

That on the thirtieth day of August, in the year of our Lord one thousand nine hundred and seven, Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosscup, were and then and there had assumed the offices and duties of directors of the Mattoon City Railway Company, and then and there composed and had assumed the duties of the board of directors of said company, a corporation organized and doing business under the laws of the state of Illinois, and the said Edgar A. Potter, was and then and there had assumed the office and duties

of president of said Mattoon City Railway Company, and Fred More was, and then and there had assumed the office and duties of superintendent of said railway company that on the day aforesaid the said Mattoon City Railway Company owned and was then and there operating a single track railroad in and between the cities of Mattoon and Charleston in said county and state, and was transacting a railroad business of carrying passengers and freight for hire and was then and there operating and running a system of electric passenger and freight motor cars upon said single track railroad for the carrying of said passengers and freight; that on the day aforesaid and in the county and state aforesaid the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell, Peter S. Grosscup and Fred More then and there composing the board of directors and superintendent as aforesaid of said company, had then and there taken on themselves the management, control and supervision of said railroad and the operation and conduct of the said passenger and freight motor cars of said company on said railroad, and it was then and there the duty of the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell, Peter S. Grosscup and Fred More, as the board of directors and superintendent as aforesaid, to then and there provide and establish with due care and circumspection for the guidance of the employees of said company and for the protection of the lives and safety of the passengers then and there carried upon the aforesaid passenger cars, proper and sufficient rules and regulations relating to the safe and efficient operation of the said passenger and freight motor cars upon said single track railroad so that the lives and safety of the passengers carried upon said passenger motor cars would be secured, and then and there take care and see to it that such rules and regulations as aforesaid were then and there provided, established and enforced in the operation and running of the aforesaid cars on said railroad, yet, not regarding their duty in that behalf and without due care and circumspection for the lives and

safety of the passengers then and there being carried on the aforesaid passenger motor cars the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell, Peter S. Grosseup and Fred More, as the board of directors and superintendent as aforesaid, did then and there feloniously and *wilfully*, fail, neglect and omit to provide and establish, and to take care and see to it that said company and railroad were then and there provided with proper sufficient, and safe rules and regulations for the guidance of the employees of said company in and about the operation and running of the passenger and freight motor cars of said company on said railroad as aforesaid so that the safety and lives of the passengers then and there being carried on the said passenger motor cars would be secured, and did then and there feloniously, wilfully and negligently and without due caution and circumspection, provide and establish and enforce unsafe, improper and insufficient rules and regulations for the guidance of the employees of said company and for the preservation of the lives and safety of the passengers then and there being carried upon said passenger motor cars, by reason whereof, and the aforesaid felonious and wilful neglect and omission of the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell, Peter S. Grosseup and Fred More, a passenger motor car of said company and a freight motor car of said company being then and there propelled by electricity in opposite directions and toward each other and at a high rate of speed along and upon said single track railroad on the day aforesaid, and in the county and state aforesaid came into violent contact and collision and said cars were then and there mashed, crushed and driven together and upon and into each other, and by means thereof mortal wounds were then and there inflicted upon and in the head and body of William Nelson, who was then and there a passenger on the aforesaid passenger motor car of said company, of which said mortal wounds the said William Nelson then and there instantly died. And so the grand jurors aforesaid do say that the said Edgar A. Pot-

ter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell, Peter S. Grosseup and Fred More, did feloniously and willfully the said William Nelson then and there kill and slay, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said people of the state of Illinois.

Count two was against Potter, Peabody, Underwood, Sampsell and Grosseup as directors and More as superintendent and alleged that it was their duty to provide "a safe railroad, safe cars, safe methods for operating the cars of said company, and to provide with due caution and circumspection safe rules and regulations relating to the operation and movements of the passenger and freight electric motor cars of said company, and for the proper performance by the several servants of said company, of their respective and several duties, whereby the safety and lives of the passengers traveling upon said railroad would be reasonably secured."

Count three was against the same defendants and alleged that it was their duty "with due caution and circumspection to provide and establish for the guidance of the employees of said company, proper and sufficient rules and regulations relating to the said operation of the business and cars of said company upon the said single track railroad whereby the safety and lives of the passengers then and there traveling upon said railroad would be reasonably secured."

Count four was against the same defendants and alleged that it was their duty "with due caution and circumspection, to prepare, provide and establish and to see that said company and railroad was provided with, a system of rules and regulations for the operation and management of the business of said company and the operations and running of the cars of said company upon said railroad, under which system faithful and careful employees of said company could operate the cars of said company on said railroad so that the lives and safety of the passengers upon said cars would be reasonably secured."

Count five was against the same defendants and alleged that

it was their duty "with due caution and circumspection to operate, conduct and manage said railroad and the business of said company so as to safely transport all passengers upon the cars of said company to their several destinations."

Count six was against the same defendants except that Potter was charged also as president of the company. It alleged that they "then and there composed the management of said railroad and said company and had then and there taken on themselves the care, control and supervision of the operation of said railroad and the business of said company and the running and management of the passenger and freight motor cars of said company on said railroad, and it was then and there their duty with due caution and circumspection to prepare, provide and establish a system of rules and regulations for the operation and management of said railroad and the business of said company and the running of said cars upon said railroad under which system faithful and careful employees of said company could operate the passenger and freight cars of said company on said single track railroad so that the lives and safety of the passengers traveling on said railroad would be reasonably secured."

Count seven was against the directors and Potter as president. It alleged that they exercised all the corporate powers of the company and had taken upon themselves the entire control, management and supervision of the business of said railroad and that it was then and there their duty "with due caution and circumspection to prepare, provide and furnish for said company, and to take care and see to it that said company was provided and furnished with a system of rules and regulations for the operation and management of the business and the running of the passenger and freight cars of said company upon said single track railroad under which system, so to be provided and furnished as aforesaid, faithful and careful employees of said company could operate the passenger and freight motor cars of said company upon and along the said single track railroad so that the lives and safety of the passengers carried upon said passenger cars would be reasonably secured."

Count eight was against the directors and alleged that it was their duty "with due caution and circumspection to provide, select and employ for said company, and to take care and see to it that said company was provided with and had employed such officials and servants as would and could operate, manage and conduct the business of said company and the system of passenger and freight motor cars of said company on said single track railroad with due caution and circumspection for the safety of the passengers carried upon the passenger motor cars of said company."

Count nine was against the directors and alleged that they "had taken on themselves the care, management and control of said single track railroad and the duty of with due caution and circumspection in providing for and seeing that said company and railroad were provided with proper rules and competent officials, so that said single track railroad could and would be operated with due care and circumspection for the lives and safety of the passengers carried upon said passenger motor cars of said company on said railroad."

Count ten was against the directors and alleged that they "had taken on themselves the care, management and control of said single track railroad and the business of said company and the duty of with due caution and circumspection providing for said company and seeing that said company was provided with proper rules and regulations, so that said single track railroad and said passenger and freight motor cars could and would be operated with due care and circumspection for the lives and safety of the passengers carried upon said passenger motor cars of said company on said railroad and for the prevention of collisions between said passenger and freight motor cars while the same were being used in the transaction of the business of said company."

Count eleven was against the directors and alleged that they had "taken on themselves the care, management and control of said single track railroad and the business of said company and the duty of with due caution and circumspection providing for said company and railroad and seeing that

said company and railroad was provided with proper rules and regulations so that said single track railroad and said system of passenger motor cars and said freight motor car could and would be operated on said railroad with due care and circumspection for the lives and safety of the passengers carried on said passenger cars and for the prevention of collisions between said passenger motor cars and said freight motor car while the same was being used in the transaction of the business of said company."

Count twelve was against the directors and alleged that they had "taken on themselves the care, management and control of said single track railroad and the business of said company and the duty of with due caution and circumspection providing for said company and railroad and seeing that said company and railroad (were) provided with proper rules and regulations (and competent and efficient officials and employees) so that said single track railroad and said system of passenger motor cars and said freight motor car could and would be operated on said railroad with due care and circumspection for the lives and safety of the passengers carried on said passenger cars and for the prevention of collisions between said passenger motor cars and said freight motor car while the same were being used in the transaction of the business of said company."

Count thirteen was substantially the same as count twelve except Potter was charged as president and More as superintendent.

Count fourteen was against Potter as president and More as superintendent and alleged that they had "taken on themselves the care, management and control of said single track railroad and the business of said company and the duty of with due caution and circumspection providing for said company and said railroad and seeing that said company and railroad were provided with proper rules and regulations and competent employees so that said single track railroad and said system of passenger motor cars and said freight motor car could and would be operated on said railroad with

due care and circumspection for the lives and safety of the passengers carried on said passenger cars and for the prevention of collisions between said passenger motor cars and said freight motor car while the same were being used in the transaction of the business of said company."

Count fifteen was in substance the same as count fourteen.

Count sixteen was against Potter alone and was in substance the same as count fifteen.

Count seventeen was against the directors and alleged that they "had then and there taken on themselves the management, control and supervision of said railroad and the operation and conduct of the said passenger and freight motor cars of said company on said railroad; and it was then and there the duty of the said * * * as such directors and board of directors as aforesaid thus in charge of and control over the operation of the aforesaid passenger motor car and the aforesaid freight motor car with due caution and circumspection to use and exercise and cause to be used and exercised all proper, reasonable and effective measures and all means within their power to prevent the said passenger motor car and the said freight motor car from colliding and to place the said passenger motor car and the said freight motor car under the government and control of employees properly trained and experienced and competent to run the aforesaid passenger and freight motor cars along the said single track railroad with safety."

Count eighteen was against the directors and alleged that it was their duty "with due caution and circumspection to use and exercise and cause to be used and exercised all proper, reasonable and effective rules and measures and all means within their power to prevent the said passenger motor car and the said freight motor car from colliding, and to ascertain and know that the said passenger motor car and the said freight motor car could be operated and run in opposite directions on said single track railroad under the rules and regulations and the officials and employees then and there employed and used in the operating

and managing of said cars on said railroad with due caution and circumspection for the lives and safety of the passengers carried upon said passenger motor car, and to place the operation, dispatching and management of said passenger motor car and said freight motor car under the government and control of some official or employee properly trained, experienced and competent to operate, dispatch and manage the said passenger motor car and the said freight motor car on said railroad with safety."

Count nineteen was against Potter as president and general manager and alleged that it was his duty "to use and exercise and cause to be used and exercised all proper, reasonable and effective rules and measures and all means within his power to prevent the said passenger motor car and the said freight motor car from colliding on said railroad and to place the said passenger motor car and the said freight motor car under the government and control of employees properly trained, experienced and competent to run, dispatch and manage the said passenger motor car and the said freight motor car on said railroad with safety to the passengers then and there carried on said passenger motor car and to ascertain and know that the said passenger motor car and the said freight motor car could be operated and run in opposite directions on said railroad under the rules and regulations and the employees then and there employed and used in the operating, dispatching and running of said cars with due caution and circumspection for the lives and safety of the passengers carried upon said passenger motor car."

Count twenty was against More as superintendent and was in substance the same as count nineteen.

Count twenty-one was against Potter as president and general manager and More as superintendent and alleged that it was their duty "to ascertain and know that the said passenger motor car and said freight motor car could be operated and run in opposite directions and toward each other and at a high rate of speed on said railroad under the

rules and regulations and the employees then and there employed and used in the operation and running of said cars, with due caution and circumspection for the lives and safety of the passengers then and there carried upon said passenger motor car and to use and exercise and to cause to be used and exercised all proper, reasonable and effective measures, rules and regulations and all means within their power to prevent the said passenger motor car and the said freight motor car from colliding on said railroad and to place the said passenger motor car and the said freight motor car under the government and control of motorneers and conductors properly trained and experienced and competent to run said cars in opposite directions along said railroad with due caution and circumspection for the lives and safety of the passengers carried on said passenger motor car."

Count twenty-two was against the directors and alleged that the company operated its road under a system of "improper, unsafe, unfit and inefficient rules and regulations and a president and general manager who was then and there incompetent, untrained and inexperienced in and about the management of said railroad and the dispatching and operation of said cars thereon," and that the said directors did "unlawfully cause, suffer and permit to be and remain established and in force and effect as the rules and regulations and the president and general manager under which said company was to operate and did operate said railroad and said cars thereon."

Indictment No. 3763 for criminal carelessness contained ten counts. Count one alleged:

That on the thirtieth day of August in the year of our Lord one thousand nine hundred and seven Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosscup were then and there and had assumed then and there the offices and duties of directors of the Mattoon City Railway Company and then and there composed and had assumed the duties of the board of directors of said company, a corporation organized and doing

business under the laws of the state of Illinois; and said corporation owned and was then and there operating a single track railroad in said county for the common carriage of passengers and freight for hire by means of a system of passenger motor cars and one freight motor car propelled on said railroad by electricity; and on the day aforesaid and in the said county of Coles and state aforesaid the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosscup as such board of directors had then and there taken on themselves the *personal* management and control of and over said railroad and the operation of said passenger motor cars and said freight motor car and of a certain passenger motor then and there governed and controlled by employees of said corporation on said railroad which said passenger motor car was then and there being operated as aforesaid and was then and there a public conveyance then and there being used for the common carriage of William Nelson and other persons as passengers for hire on said railroad; and it was then and there the duty of the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosscup as such board of directors and having then and there the personal management and control over said public conveyance and said railroad as aforesaid to provide and cause to be provided employees who are competent, trained and experienced in and about the careful and safe dispatching and operation of said public conveyance and said freight motor car upon said railroad so that the safety of the said William Nelson and other persons then and there passengers on said public conveyance would not be unreasonably and unnecessarily endangered, yet, unmindful of their duty in that behalf the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosscup, were then and there guilty of felonious, wilful and gross carelessness and neglect in, and in relation to, the conduct, management and control of said public conveyance while the same was then and there being used for the common carriage

of the said William Nelson and other persons as passengers as aforesaid, in that they, the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosseup as such board of directors as aforesaid did then and there feloniously, wilfully and with gross carelessness provide and caused to be provided an employee for the operation and dispatching of said public conveyance and said freight motor car along and upon said railroad which said employee was untrained, incompetent, and inexperienced in and about the safe and careful operation and dispatching of said public conveyance and said freight motor car as aforesaid; and the incompetency, unfitness and inefficiency of said employee for the purpose of providing safety to the said William Nelson and other persons so being passengers as aforesaid should have been known to the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosseup and they might by the exercise of ordinary observation and inquiry have ascertained the same and should so have ascertained before said public conveyance and the said freight motor car were operated and caused to be operated as herein mentioned; and notwithstanding the premises, the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Peter S. Grosseup and Marshall Sampsell were then and there guilty of felonious, wilful and gross carelessness and neglect in that they feloniously and wilfully and with gross negligence did then and there on the day aforesaid and in the county and state aforesaid the said public conveyance then and there being used for the common carriage of said William Nelson and other persons as aforesaid, and the said freight motor car, operate and run and cause, suffer and permit to be operated and run on said railroad in opposite directions and toward each other and at a high rate of speed under the dispatching and direction of the aforesaid employee who was then and there incompetent, untrained and inexperienced in and about the careful, safe and proper manner to so dispatch and operate the said public conveyance and the said freight motor car in opposite di-

rections and toward each other as aforesaid so that the safety of the said William Nelson and the other passengers on said public conveyance would not be then and there unreasonably and unnecessarily endangered; and by reason thereof the said public conveyance and the said freight motor car being then and there operated and dispatched and controlled as aforesaid did then and there come into violent contact and collision and were then and there by reason of such collision mashed, crushed and driven together and upon and into each other and by reason thereof the said William Nelson was then and were thrown down and upon the beams, timbers and iron pieces and other component parts of said public conveyance and mortal wounds were then and there inflicted thereby upon and in the head and body of the said William Nelson from which said mortal wounds the said William Nelson then and there instantly died. And so the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosscup were then and there guilty of felonious, wilful and gross carelessness and neglect in and in relation to the conduct, management and control of said public conveyance while the same was being then and there used for the common carriage of the said William Nelson and other persons as aforesaid and by reason thereof and whereby the safety of the said William Nelson who was then and there a passenger on said public conveyance was then and there by the felonious, wilful and gross carelessness and neglect of the said Edgar A. Potter, Francis S. Peabody, Arthur W. Underwood, Marshall Sampsell and Peter S. Grosscup endangered contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the state of Illinois.

The remaining nine counts contained the same variations with respect to parties, duties, etc., as indictment No. 3762 *supra*.

It is unnecessary to a correct understanding of the opinion of the court to refer to the indictments against the other defendants.

THOMPSON, J.:—

I desire now to express my appreciation to the state's attorney and each of the attorneys for the defendants, for the very able and exhaustive arguments made in these cases. I realize the seriousness of this matter, both to the defendants who stand charged with a felony, and to the victims of that unfortunate occurrence, and I am not unmindful of the very bitter feeling engendered throughout this county by it.

The Mattoon City Railway, an Illinois corporation, owns and operates a single track interurban electric railroad, between the cities of Mattoon and Charleston, Illinois, a distance of about eleven miles. On August 30, 1907, an express car going west on a sharp curve, which rounded a high point of land, collided with a passenger car going east, and eighteen people were killed and about as many more injured.

As a matter of common knowledge we all know that accidents of that kind do not occur without the fault of somebody. Some one, or more persons, was to blame for that unfortunate occurrence. One can hardly realize such an occurrence without involuntarily saying, "someone has blundered, someone was negligent, someone was to blame and should be punished."

As said by Blackstone, the principal object of criminal prosecution is not so much to punish the defendant, as to set an example to others, to not violate the law. The state does not ask for vengeance alone. It cannot benefit the state to hang a man for murder, except in so far as it sets an example to others not to kill.

The motion to quash of course challenges the legal sufficiency of the indictments, and each count, and under that motion, numerous reasons are urged against their sufficiency, some of which I shall not take the time to even mention, much less to discuss.

Indictment No. 3762 is against the defendants for "manslaughter," and contains twenty-two counts, some of which include only the directors, others the directors and officers,

and still others the directors, officers and superintendent of said railway company.

Indictment No. 3763 is against the defendants, for "criminal carelessness," and contains ten counts, some of which include only the directors, others the directors and general manager, and still others the general manager and superintendent, and is drawn under section 49, of the criminal code of Illinois, which is as follows:

"Whoever, having personal management or control of or over any steamboat or other public conveyance used for the common carriage of persons, is guilty of gross carelessness or neglect in, or in relation to, the conduct, management or control of such steamboat, or other public conveyance, while being so used, for the common carriage of persons, whereby the safety of any person shall be endangered, shall be imprisoned in the penitentiary not exceeding three years, or fined not exceeding \$5,000.00." (Hurd's Rev. Stat., 1906, p. 681).

I will discuss the second indictment first, as much of what I shall say will also apply to the first.

Let us for a moment discuss that statute. So far as I can learn it was passed in 1874, or at least was in the revision of that date, and has been in force ever since and it seems a little significant that after the exhaustive research of counsel, no prosecution under it can be found in this state. Being a penal statute, it should be, and under the well known rules of construction, is to be strictly construed. By express terms it is limited to "whoever having personal management and control." Of what? A business? A company? A corporation? A railroad? No! "A steamboat or other conveyance used for the common carriage of persons." When? "While being so used." How? "For the common carriage of persons, whereby the safety of any person shall be endangered, shall be imprisoned," etc. I do not think this statute was ever intended to apply to persons having the management or control of the business, such as directors or officers of a corporation.¹

NOTE 1.—This holding is sustained by many authorities construing analogous statutory provisions.

It is also urged that the indictments are bad, because of the misjoinder of the defendants. An indictment is a charge, against one or more defendants, and additional counts may be added, charging the commission of the offense in different ways, in order that the proof, if it should not be as the pleader anticipated in the first count, would prove the allegations of some one of the others. If there is absolute certainty as to the proof, there is no necessity for more than one count in an indictment for an offense. I do not understand, and I have not been referred to any authority which holds that an indictment can charge part of the defendants in some of its counts and part of them in others, as in both of these indictments, charging the directors alone in some counts, the directors and general manager in others and the general manager and superintendent in still others.²

Thus in *Caron v. B. & A. R. R. Co.* (Mass. 1895), 42 N. E. 112, the court said:

"We think, therefore, that by the words 'any person . . . who has the charge or control' is meant a person who, for the time being at least, *has immediate authority to direct the movements and management of the train as a whole*, and of the men engaged upon it."

And in *Thyng v. Fitchburg R. R.* (Mass. 1892), 30 N. E. 169, it was said that the statute "seems to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements. The charge or control is of that whose characteristic is rapid and forceful motion."

See also to the same effect *Fairman v. B. & A. R. R. Co.* (Mass. 1897), 47 N. E. 613; *L. & N. R. R. Co. v. Richardson* (Ala. 1893), 14 So. 209; *Davis v. N. Y., etc., R. R. Co.* (Mass. 1893), 34 N. E. 1070; *Steffe v. Old Colony R. R. Co.* (Mass. 1892), 30 N. E. 1137; *Cox v. Railway Co.*, 9 Q. B. Div. 106, and on the meaning of "personal management" or "personal control" in general, see *Mulford v. Gibbs*, 41 N. Y. S. 273; *Prince v. Brett*, 47 N. Y. S. 402; *Coburn v. Kerswell*, 35 Me. 126; *Youst v. Willis* (Cal.), 49 Pac. 56, and vol. 5 Century Dict. and Cyc. title "personal"; Standard Dict. title "personal."—Ed.

NOTE 2.—The following authorities support this holding:

State v. Daubert, 42 Mo. 242; *McMullin v. Church*, 82 Va. 501; *Howard v. State*, 40 So. 653 (Miss.); *McElroy v. United States*, 164 U. S. 76.—Ed.

But it is urged by the prosecutor, that he can nolle the counts which charge separate defendants, thereby leaving only those counts which charge the same defendants. An indictment is a charge against a certain person or persons, with the commission of an offense, but the separate counts must charge the same defendants with the same offense, but not necessarily of having committed it in the same way. For example, A is found dead in a pool of water. B and C are indicted. One count charges them with having murdered him by choking him; another count by striking him on the head; another by drowning him. The defendants are the same, the offense is the same but the manner of committing it is different. I think both indictments are bad for that reason, nor do I believe it will make such an indictment good to nolle the bad counts. I do not think you can make a good indictment out of a bad one by nollying the bad counts.

It is also urged that these indictments are bad because there is no joint legal duty and responsibility resting upon the defendants. In other words, the duties and responsibilities resting upon the directors were not the same as upon the general manager or the superintendent. Consequently the violation of the duty owing by some of the defendants would not apply to others. As was said in the Ford Theater Case (*Ainsworth v. United States*, 1 App. Cas. [D. C.] 518), the duties resting upon the architect who drew the plans and specifications for the improvement, were different from the superintendent who had general supervision of the work and also of the foreman directly in charge of the men who excavated the earth beneath the supports, and thereby caused the building to collapse.³

NOTE 3.—The case of *Ainsworth v. United States*, 1 App. Cas. 518 the leading case on the subject, is decisive of the point. The opinion contains a masterly and logical exposition of the doctrine of misjoinder. To the same effect, see 21 Cyc. Law and Proc. p. 839; *People v. Davis*, 1 Ill. C. C. 217, 241; *Commonwealth v. Miller* 2 Pars. Sel. Eq. Cas. 480; *United States v. Davis*, 33 Fed. 621; Wharton's Crim. Pl. and Pr. (9th ed.) sec. 303.

The rule in civil cases is the same. Thus, a master and servant

There is no question in my mind as to the criminal liability of directors of a corporation in certain cases of neglect of duty. There are certain duties and responsibilities resting upon the board of directors, which they are no more at liberty to violate or disregard than those resting upon individuals, and in many ways may be likened to the owner in case the business was owned and conducted by an individual instead of a corporation. To say that the owner of this railroad would be jointly liable, criminally with the superintendent or general manager, who negligently or wilfully gave orders which resulted in the wreck, or with the motorman who negligently or wilfully ran his car into another, either in obedience to or in direct violation of those orders, would not, upon the mere statement of the proposition, meet the approval of any fairminded person. To include the directors with the other defendants, in these indictments, I think makes them bad.*

cannot be jointly sued for the tortious act of the servant. See *McNemar v. Colin*, 115 Ill. App. 31; *Berghoff Brewing Co. v. Prghylski*, 82 Ill. App. 361; *Schmidt v. Balling*, 91 Ill. App. 388.—Ed.

NOTE 4.—It is well settled that to render a director or an officer of a corporation criminally liable, for causing death he must personally participate in the acts causing the death.

A leading case is *People v. Clark*, 8 N. Y. Crim. Rep. 178, 14 N. Y. S. 642, where the authorities are reviewed. The defendants there were indicted as the president and directors of a railroad company for violation of a statute prohibiting the heating of cars by stoves. The court concluded:

"Where a statute prohibits the doing of an act by a class of persons * * * all active participants in such violation are equally guilty, be they directors or other agents or servants of the corporation; the directors not because they are directors, but personally; no individual however, being liable who does not personally participate in the doing of the act. * * *"

In *State v. Young*, 56 Atl. 471, 26 N. J. Law, 264, a verdict of acquittal was directed in a prosecution for manslaughter against the president, vice president, executive committee, general superintendent, etc., of a street railway company for causing the death of a passenger at a grade crossing. Judge Gummere stated the rule thus:

It is urged that each and every count in both indictments is bad for duplicity. An indictment should be certain and specific as to the defendants, the offense, and the manner of its commission, so that the plea of "not guilty" will raise a

"The question of criminal responsibility of the individual officers or agents of the company is a much narrower one than that of the civil responsibility of the corporation. It must appear that each one of these directors or officers, to be responsible criminally, has been guilty of gross negligence, either in the doing of, or in the omission to do, some specific act, which was rendered necessary in the performance of his duty to the children who rode on that car."

The rule is laid down in 21 Am. & Eng. Ency. of Law (2nd ed.) 896, thus:

"In order to hold an officer or agent criminally liable individually for an offense committed by the corporation, or by its officers or agents, it must be shown that he had some actual personal connection with the illegal act charged."

In 3 Cook on Corporations, sec. 908, it is said:

"Directors are not criminally liable for accidents where they were not personally in charge of the running of the road."

And see the charge to the jury of Judge Kellogg of the New York supreme court (yet unreported), rendered December 18, 1907, in *People v. Smith* (an indictment against the vice president of the N. Y. Central & H. R. R. Co., on account of the death of certain passengers in a railway wreck). For the decision on the motion to quash the indictment see *People v. Smith*, 105 N. Y. S. 1082, decided September 2, 1907. To the same effect see *State v. Parsons*, 12 Mo. App. 205; *State v. Gilmore*, 24 N. H. 461; *State v. Patton*, 26 N. C. 16; *People v. White Lead Works*, 82 Mich. 471; *State v. Great Works Milling & Mfg. Co.*, 20 Me. 41; *Commonwealth v. Demuth*, 12 S. & R. 389; *In re Greene*, 52 Fed. 119; *State v. Wabash R. R. Co.*, 115 Ind. 466; *City of Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 99; *Ex parte Grand Trunk Railway Co.*, 18 Lower Canada Jurist, 141; *State v. White* (Mo.), 69 S. W. 684; *People v. England*, 27 Hun, 139; *State v. Barksdale, Mayor*, 5 Humph. 154; *Kane v. People*, 3 Wend. 363; 3 Thompson on Corporations, sec. 4114; Bishop's New Criminal Law (8th ed.), vol. 1, sec. 424; vol. 2, secs. 1270, 1282.

It is equally well settled that to render a person liable on account of negligent omission whereby a death is caused, the omission must be due to gross and culpable negligence and must have resulted from the neglect of a plain duty imposed upon the defendant personally and the death must be the direct result of such negligence.

single issue upon each count. If more than one issue is raised upon any count by that plea, the count is duplicitous, and would be bad for that reason in a common law declaration.

Take for example the first count of No. 3762. It alleges that on August 30, 1907, Potter, Peabody, Underwood, Sampsell and Grosscup "were and then and there had assumed the offices of and duties of directors of" said railway company, a corporation, etc., and the said Potter "was and then and there had assumed the office and duties of president of said Mattoon City Railway Company, and Fred More was, and then and there had assumed the office and duties of superintendent of said railway company," and "that on the day aforesaid the said Mattoon City Railway Company owned and was then and there operating a single track railroad in and between the cities of Mattoon and Charleston, in said county and state," etc.; that on that day said directors and More composing said board and superintendent as aforesaid

This rule is laid down and established by numerous authorities. See 21 Cyc. Law & Proc. pp. 765, 768, 769 (nn. 92, 93), 770; Clark's Crim. Law, p. 174; Wharton on Homicide (3rd ed.), secs. 446, 447, 449, 451, 457, 466, 467, 468, 480; 21 Am. & Eng. Ency. of Law (2nd ed.), pp. 99, 194; Kerr on Homicide (ed. 1891), sec. 157; *Regina v. Pocock* (a leading case), 5 Cox C. C. 172, s. c. (somewhat differently reported), 79 Eng. C. L. 34; *Rex v. Allen*, 7 Car. & P. 153; *Rex v. Green*, 7 Car. & P. 156; *Regina v. Haines*, 2 Carr. & K. 368; *United States v. Knowles*, 4 Sawy. 517, Fed. Cas. 15,540; *Thomas v. People*, 2 Colo. App. 513, 31 Pac. 349; *Hilton's Case*, 2 Lewin C. C. 214; *Regina v. Bennett*, 8 Cox C. C. 74; *Anderson v. State* (Tex.), 11 S. W. 33; *People v. Eberly*, 2 Colo. Law Rep. 78; *Johnson v. State*, 61 L. R. A. 277 n.; *Ainsworth v. United States*, 1 Appeal Cas. 518; *Fenton's Case*, 1 Lewin C. C. 179; *People v. Munn*, 65 Cal. 211; 1 East's Crown Law, p. 265; Wharton's Criminal Law (9th ed.), sec. 1580.

That the negligence must be gross and culpable is established by the following additional authorities: *Regina v. Elliott*, 16 Cox C. C. 710; *Regina v. Finney*, 12 Cox C. C. 625; *Regina v. Gregory*, 2 Fost. & Finl. 153; *Beek v. People*, 125 Ill. 584; *State v. O'Brien*, 32 N. J. L. 169; *Fitzgerald v. State*, 112 Ala. 34, 20 So. 966; 8 Criminal Law Magazine, p. 124.—Ed.

“had then and there taken on themselves the management, control, and supervision of said railroad and the operation and conduct of the said passenger and freight motor cars of said company on said railroad, and it was then and there the duty of the said Potter, Peabody, Underwood, Sampsell, Grosseup and More, as the board of directors and superintendent as aforesaid, to then and there provide and establish with due care and circumspection for the guidance of the employees of said company and for the protection of the lives and safety of the passengers then and there carried upon the aforesaid passenger cars, proper and sufficient rules and regulations relating to the safe and efficient operation of the said passenger and freight motor cars upon said single track railroad so that the lives and safety of the passengers carried” would be secured, etc., “and to then and there take care and see to it that such rules and regulations as aforesaid were then and there provided, established and enforced in the operation and running of the aforesaid cars on said railroad, yet, not regarding their duty in that behalf and without due care and circumspection for the lives and safety of the passengers then and there being carried on the aforesaid passenger motor cars the said” directors and More, as the board of directors and superintendent as aforesaid, “did then and there feloniously and wilfully fail, neglect and omit to provide and establish, and to take care and see to it that said company and railroad were then and there provided with proper, sufficient, and safe rules and regulations for the guidance of the employees of said company in and about the operation and running of the passenger and freight motor cars of said company on said railroad as aforesaid so that the safety and lives of the passengers then and there being carried on the said passenger motor cars would be secured, and did then and there feloniously, wilfully and negligently and without due caution and circumspection, provide and establish and enforce unsafe, improper and insufficient rules and regulations for the guidance of the employees of said company and for the preservation of the lives and safety of the passengers then and there being carried upon said pas-

senger motor cars, by reason whereof, and the aforesaid felonious and wilful neglect and omission of the said 'directors and More,' a passenger motor car of said company and a freight motor car of said company, being then and there propelled by electricity in opposite directions and toward each other and at a high rate of speed along and upon said single track railroad on the day aforesaid, and in the county and state aforesaid, came into violent contact and collision and said cars were then and there mashed, crushed and driven together and upon and into each other, and by means thereof mortal wounds were then and there inflicted upon and in the head and body of William Nelson," a passenger, etc.

A count should allege the existence of facts upon which the law creates the duty, and it is not sufficient to allege that it then and there became and was the duty of defendants to provide and establish with due care and circumspection for the guidance of the employees and safety of the passengers. proper and sufficient rules and regulations relating to the safe and efficient operation of said freight and passenger cars, and to see that they were enforced in the running of said cars.

Then again, line 69, page 21, "did then and there feloniously, wilfully and negligently and without due caution and circumspection, provide and establish and enforce unsafe, improper and insufficient rules and regulations," etc. Line 59 alleges the defendants did "fail, neglect and omit to provide and establish," proper, sufficient, and safe rules, etc. In line 59, committed manslaughter by negligently omitting to provide and enforce safe rules, and in line 69, committed manslaughter by negligently providing and enforcing unsafe rules.

Again no rule or regulation is alleged that the court may judge as to whether or not it is safe, reasonable, proper or sufficient. What rules were violated? How were the defendants negligent?

Again, the allegations should show a direct casual connection between the act and the death. To allege that A shot B

with a gun and that B afterwards died is not sufficient. So far as the allegations of this count are concerned, one or both motormen may have been, at the time of the accident, wilfully violating some positive rule of the railroad, which resulted in the collision.

Neither do I see how the directors can be held liable at common law for manslaughter. They cannot be held liable civilly,⁵ and no authority has been cited, which holds them

NOTE 5.—Directors and officers of corporations are not civilly liable to third persons for negligence, unless they personally participate in the acts of negligence and even where directors or officers are guilty of negligence a distinction is to be noted between acts of nonfeasance and acts of misfeasance. While it may be the duty of a particular corporation, as for instance a common carrier, to use the utmost degree of care towards the public, the officers and directors of such corporation are merely its servants or agents and their duty is owing to the corporation and not to third persons. Consequently they are not liable to third persons for acts of nonfeasance.

In *Shearman & Redfield on Negligence* (5th ed.) sec. 243 the rule is stated:

"The directors or other officers of a corporation cannot be held liable to a stranger for any omission on the part of the corporation to perform a duty to him, even though such omission is the direct result of the vote of such directors, who have exclusive control of the corporate business." See also sec. 244.

The leading case is *Lane v. Cotton*, 12 Mod. 472, a decision by Holt, J., where the court said:

"His neglect is only chargeable on his master or principal for a servant or deputy, quatinus such, cannot be charged for neglect, but the principal only shall be charged for it, but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer."

See also to the effect that agents are not liable to third persons for acts of nonfeasance: *Murray v. Usher*, 117 N. Y. 542; *Van Antwerp v. Linton*, 35 N. Y. S. 318; *Ballow v. Farnum*, 9 Allen, 47; *Denny v. Manhattan Co.*, 5 Denio, 639, aff. 2 Denio, 115; *Dean v. Brock* (Ind.), 38 N. E. 829; *Regina v. Smith*, 11 Cox C. C. 210; *De-laney v. Rocherau*, 34 La. Ann. 1123; *Lundy v. Delmas*, 104 Cal. 655; *Davenport v. Newton* (Vt.), 42 Atl. 1087; *Fanning v. Osborne*, 102 N. Y. 441; *Feltus v. Swan*, 62 Miss. 415; *Labodie v. Hawley*, 61 Tex. 177; *Reid v. Humber*, 49 Ga. 207; *Steinhauser v. Spraul*, 127 Mo. 541; *Drake v. Hogan* (Tenn.), 67 S. W. 470; *Bassett v. Fish*, 75 N.

criminally liable in such a case.⁶ That the corporation is liable in damages, no one will dispute. That the person or persons directly responsible for the death is criminally liable I do not doubt. Suppose the board of directors, or the super-

Y. 303; *Wahrman v. Board of Education*, 187 N. Y. 331, 80 N. E. 192; Wharton on Homicide (3rd ed.) p. 682; Mechem on Agency (ed. 1889), secs. 539, 569, 570; 1 Ency. of Law (2nd ed.), p. 1131; Ewell's Evans on Agency, p. 438.

But in *Baird v. Shipman*, 132 Ill. 16, it was held that where an agent of a nonresident owner of a house and lot, having the same charge of the property as the owner would have had were he present, leases the same, with knowledge or notice that one of the stable doors on the premises is unsafe and in a dangerous condition, and an expressman, while engaged in delivering a load of kindling wood in the barn for one of the tenants, was killed by the falling of such door, that the agent was liable to the personal representative of the deceased in damages and could not excuse himself on the plea of the liability of his principal. This decision is against the great weight of authority in so far as it tends to hold that an agent is liable to third persons for mere acts of nonfeasance, but the case is usually classed as one in which the agent was guilty of misfeasance and not mere nonfeasance. This on the theory that as the agent had entered upon the execution of a particular work it was his duty to use reasonable care in the manner of executing it. See vol. 1, Ency. of Law (2nd ed.), p. 1132. But the decision is reconcilable with the general rule above stated for the reason that as the owner was outside the jurisdiction of the court the agent must be treated as the person in control. This distinction would not exist in the case of a corporation which can act only through its officers and agents, and consequently the corporation would be liable under the doctrine of respondeat superior. See also Mechem on Agency, sec. 572; Wharton on Negligence, sec. 535, and *Cameron v. Kenyon-Connell Comm. Co.* (Mont.), 56 Pac. 358, which lean to a contrary view. In the latter case the court said:

"Nonexecution which resulted in the positive act of a creation and maintenance of a continuing nuisance on account of which a third person was killed, amounts, unless explained, to misfeasance upon the part of all the directors of the company."

The proposition that directors are only liable for negligence where they personally participate in the acts of negligence is sustained by the following authorities: *Belo v. Fuller* (Tex.), 19 S. W. 619; *Folwell v. Miller* (C. C. A.), 145 Fed. 495; *Henry v. Brackenridge*, 48 La. Ann. 950; *Bianki v. Greater Am. Exp. Co.* (Neb.),

intendent provided proper rules, and the motorman either negligently or wilfully, in violation of the rule, causes a death, upon what legal principle would the directors or superintendent be criminally liable?

Suppose I tell my man to take the horse to the shop to be shod, and on the way, he negligently or wilfully runs over a child in the street, would anyone say I could be convicted of manslaughter and confined in the penitentiary?

The mere statement of the proposition is abhorrent to any fair-minded person. If that was the law no one would dare engage in any business beyond that of driving his own team, for fear of the criminal consequences.

As to the objection to the legality of the indictments as found and returned by the grand jury according to the affidavits filed. The grand jury met on October 14, 1907, and returned indictments against all these defendants in these cases, and finished the work for that term on October 30, 1907, but were told by the presiding judge to not adjourn, as they might be needed again and if so they would be notified. The grand jury did not adjourn, but as the affidavits say, "drew their pay and went home." All the indictments against these defendants, returned at that time, have been nolle. On January 6, 1908, the members of the grand jury, in response to a postal card sent them by the sheriff upon

92 N. W. 615; 10 Cyc. Law & Proced., p. 829; see also note to *Nunnally v. Southern Iron Co.*, 28 L. R. A. 421. *Contra*, *Nunnally v. Southern Iron Co.* (Tenn.), 94 Tenn. 397, 28 L. R. A. 421; *National Cash Register Co. v. Leland*, 94 Fed. 502 (C. C. A.). Compare *Peck v. Cooper*, 112 Ill. 92.—Ed.

NOTE 6.—In Wharton on Homicide (3rd ed.), p. 683, sec. 447, the rule is stated:

"So far as concerns homicide, we may safely say that there is no criminal responsibility where the defendant would not have been civilly liable at the suit of the party injured, had he survived the injury."

And in *Regina v. Burchall*, 4 Fost. & Finl. 1087, Judge Willes said that until he saw a decision to the contrary he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action.—Ed.

notice from the clerk, that the judge wanted them to return, met at 1:30 p. m. and returned all these and other indictments into court, and adjourned at 2:45 p. m.

Section 19, chapter 78, Rev. Stat. of Ill. provides that "The judge of any court of record of competent jurisdiction may order a *special venire* to be issued for a grand jury at any time when he shall be of opinion that public justice requires it. The order for such *venire* shall be entered on the records of the court by the clerk thereof; and such clerk shall forthwith issue such *venire* under his hand and the seal of the court, and deliver the same to the sheriff, who shall execute the same by summoning, in the same manner now provided or that may hereafter be provided by law for summoning jurors, twenty-three persons, qualified by law, to constitute a grand jury."

Objection is made that several of these grand jurors were summoned by the sheriff enclosing a copy of the *venire* and a return card to himself, in a letter to the juror upon which the juror acknowledged service and promised to be present. This practice has obtained in a number of counties in this state. No authority has been cited upon that objection, and since every juror reported and was impaneled, I will not hold the grand jury was illegal for that reason. I think the service was not as required, and had some one so notified failed to appear, and his place filled, it might make it an illegal grand jury. I would not want to issue an attachment upon that notice.

"If a grand jury shall be required by law or by the order of the judge for any term of court, it shall be the duty of the county board * * * to select twenty-three persons," etc., and to cause *their* clerk within five days thereafter to certify them to the clerk of the court, etc. (sec. 9, chap. 78 Rev. Stat. of Ill.)

It is objected that because the clerk of the county did not so certify these persons to the circuit clerk for seven days after they were selected, the grand jury is illegal. I think that provision of the statute is directory only, and failure

of the clerk to so certify them, should not be held to avoid the grand jury.

It is also urged that these indictments are void, because they were not read to the grand jury, and it heard no evidence at that meeting, and all the knowledge it had of their contents was the statement of the prosecutor, to the effect that the others returned might prove insufficient or defective, and he desired these returned. I do not think it can be said that no evidence was heard in support of these indictments. It is conceded that the grand jury heard evidence in these cases in October, and the mere fact that they were not prepared and returned till January 6, would not avoid them. I know of no law or reason why the grand jury should return indictments within any specified time.⁷

It is also urged that because the witness Jenkins was sworn by another member of the grand jury, in the absence of the

NOTE 7.—In *State v. Ivey*, 100 N. C. 541, 5 S. E. 407, an indictment was returned by the grand jury and being insufficient was quashed. Thereupon the same grand jury returned a second indictment without re-examining the witnesses on hearing further evidence. The court held the indictment insufficient for this reason.

It is believed that this decision cannot be sustained either on principle or authority and that the decision of Judge Thompson in the above case is correct.

In Bishop's New Criminal Procedure, sec. 870, it is said:

"The grand jury at any time during the term of organization and service may find a second indictment as a substitute for the first without hearing the evidence anew."

And in 10 Ency. Pl. & Pr. 395 n., it is said:

"Where an indictment is defective or is recommended to the same grand jury, it may find another indictment without recalling the witnesses who had already been before it."

The same principle is laid down in the following authorities: *Whiting v. State*, 48 Oh. St. 220; *McIntyre v. Commonwealth* (Ky.), 4 S. W. 1; *State v. Clapper*, 59 Ia. 279; *Creek v. State*, 24 Ind. 151; *State v. Peterson*, 61 Minn. 73, 63 N. W. 171; *Commonwealth v. Woods*, 10 Gray, 477; *Commonwealth v. Clune*, 162 Mass. 206; 17 Am. & Eng. Ency. of Law, 1285. In *Spannenberger v. State*, 53 Ala. 481, and *State v. Grady*, 12 Mo. App. 361, the rule was denied with respect to the finding of a former grand jury.—Ed.

foreman, and testified in these cases, that these indictments are illegal.

Section 17 provides: "After the grand jury is impaneled, it shall be the duty of the court to appoint a foreman, who shall have power to swear or affirm witnesses to testify before them," etc. While the statute does not exclusively authorize the foreman to swear witnesses, I am inclined to think that was intended by the legislature. Certainly he is expressly given that authority and had the legislature intended, it could as easily have said "all members" as "the foreman." But the affidavits show that other witnesses were sworn by the foreman, and testified upon the same matters as Jenkins, and if his testimony was improperly received, there still remains sufficient evidence.

It is also urged that the state's attorney should not have been present when these indictments were voted. I know of no statute which authorized the state's attorney to be present in the grand jury room, during its deliberations, but so far as I know, it is the general custom throughout the counties of this state. He generally conducts the examination of witnesses and prepares all indictments. It would be practically impossible to leave the preparation of indictments to the members of the grand jury and expect good indictments. It is pretty difficult for an experienced lawyer to get them sufficient in many cases. I think the state's attorney may properly be with the grand jury and advise them and counsel with them, as to their duties and work, so long as he does not prevail upon it to return an indictment which it would not otherwise have done, for it would then be his, and not the grand jury's.⁸

It is also urged that when the grand jury returned their indictments October 30, and as the affidavit states "drew their pay and went home," that terminated their authority and duty as a grand jury. Had the grand jury adjourned for a week, a month, or until January 6, 1908, I would have

NOTE 8.—See *Gitchell v. People*, 146 Ill. 175, 187, and *Regent v. People*, 96 Ill. App. 189, 196.—Ed.

no doubt of their authority to act at such adjourned meeting. But it seems to me that under the facts in this case they were through, providing the judge should not order them reconvened. In other words, to all intent and purposes they were discharged, if he did not send for them, but if he should send for them they were not discharged.

The affidavits state that the judge made no order on his docket as to the recalling of the grand jury, but that the clerk without legal authority, wrote it up as an order of court. I cannot see how that can tend to support the indictments for if the judge made no order, then the meeting on January 6 was without the order of the judge, and certainly it will not be claimed that the clerk or sheriff had power to recall a grand jury. But I think it was the duty of the clerk to correctly record the court proceeding of the day, and if the judge so directed the grand jury the court proceeding should so show. Still, I am aware of no law which places the grand jury under the direction of the judge, clerk or sheriff, during the entire term of court, to be called together at any time to make presentments.

Section 19 above quoted contemplates just such a situation and provides that a special venire may be ordered by the judge at any time when he shall be of opinion that public justice requires it, and provides how it shall be done. This section of the statute is absolutely of no force, if the methods pursued in this case are to be held legal. If that is the law, a grand jury would be a sort of censor over the people of the county from one term of court till the next, come and go as they pleased, never adjourn, meet at any time of their own notion, or at the request of the judge, clerk or sheriff, and return a few indictments and separate at will.

I think that when the grand jury quit on October 30, 1907, its authority ended, and all the indictments returned on January 6, 1908, were without authority and void. The motions will be sustained, and each of said indictments ordered quashed and the defendants discharged.

(Superior Court of Cook County.)

Brainard

vs.

Brainard.

(March 28, 1908.)

1. **CONSTITUTIONAL LAW—SECTION 13 OF PRACTICE ACT—VALIDITY—SERVING PROCESS ON NON-RESIDENT PARTNERSHIP—DUE PROCESS OF LAW.** Section 13 of the new practice act which provides that a co-partnership whose members are all non-residents but who have a place of business in this state, may be served with process by serving the same upon any of its agents is unconstitutional as depriving a person of his property without due process of law; its effect being to authorize a personal judgment on substituted service.
2. **SAME—IMMUNITIES—DISCRIMINATION.** The law is also invalid because it discriminates against the citizens of other states, thus violating clause 1, sec. 2, art. 4 of, and the 14th amendment to the Federal constitution.

Motion to quash attachment writ. Heard before Judge Ben M. Smith.

This action was in assumpsit by the plaintiff against her divorced husband to recover on a decree of alimony rendered by the circuit court of Sangamon county. The suit was commenced on October 22, 1907, and on the same date plaintiff sued out an attachment in aid against the defendant as a non-resident, alleging his place of residence to be at Detroit, Michigan. The sheriff made a return upon the attachment writ that he had served the same upon the firm of A. O. Brown & Co., a co-partnership, as garnishees, by serving the same upon an agent of said co-partnership in charge of the Chicago office of said firm. The garnishees, Albert O. Brown and five other individuals composing said firm of A. O. Brown & Co., appeared specially and moved to quash the writ and to dismiss said suit as to them for the reason that said writ was not served upon them or any or either of them.

It was admitted that the firm of A. O. Brown & Co. was

composed of six members, all residents of the state of New York, in business as brokers, having a main office in New York City and branch offices in Chicago and also in Detroit, in which latter office the defendant, Brainard, was in their employ.

The plaintiff attempted to sustain such service under section 13 of the new practice act, approved June 3, 1907 which is as follows: "A co-partnership, the members of which are all non-residents but having a place or places of business in any county of this state in which suit may be instituted, may be sued by the usual and ordinary name which it has assumed and under which it is doing business, and service of process may be had in such county upon such co-partnership by serving the same upon any agent of said co-partnership within this state."

By the motion to quash the writ, the constitutionality of said section 13 was directly put in issue.

Seth F. Crews, for the plaintiff; *M. Paul Noyes* for the garnishees.

Judge Smith held said section unconstitutional for two reasons:

First: That it is obnoxious to the constitutional requirement that no person shall be deprived of property without due process of law (U. S. const. 5th and 14th amendments and Ill. const. art. 2, sec. 2), the necessary effect of the statute, if sustained, being to authorize a personal judgment without personal service, and

Second: That it is invalid as discriminating against citizens of other states, thereby violating the 14th amendment to the federal constitution and also clause 1, sec. 2, art. 4 of the federal constitution.

NOTE. The same conclusion was reached by Judge John H. Hume of the municipal court in *Jones v. Auditorium Theater Co.* (decided 1908, unreported).—Ed.

(Circuit Court of McLean County.)

H. H. Littlefield

VS.

William Green.

(January Term, 1869.)

1. **COURTS—JURISDICTION OF SUBJECT MATTER—CONSENT OF PARTIES.**
If a court has no jurisdiction of the subject matter of a controversy the consent of the parties can never confer it.
2. **VENUE—CHANGE OF—MOTION TO CONTINUE CAUSE—WAIVER OF IRREGULARITIES.** If a court has jurisdiction of the subject matter of a controversy then all irregularities in the manner of taking a change of venue are waived by a motion either to continue the cause or by setting it down for hearing in the court to which the change has been taken.
3. **WORDS AND PHRASES—"ACTION."** An action is defined to be the "form of a suit given by law for the recovery of that which is one's due or it is a legal demand of a man's right."
4. **VENUE—CHANGE OF—"CIVIL CAUSE IN LAW OR EQUITY"—CONTESTED ELECTION.** As a contested election case is neither a cause in law or equity the venue act does not authorize the parties thereto to transfer the cause from the court in which it was originally instituted.
5. **SAME—JURISDICTION OF SUBJECT MATTER—REMANDING CAUSE.**
As there is then no authority in the statutes for taking a change of venue in a contested election case an order allowing a change is a nullity which confers no jurisdiction of the subject matter on the court to which the order runs and therefore the latter court must remand the cause.

Motion to remand cause. Heard before Judge John M. Scott. The facts are stated in the opinion.

SCOTT, J.:—

This is a proceeding under chapter 37 of the revised statutes of 1845, entitled "Elections," to contest, for a certain cause set forth in the notice, the election held in Cass county on the 9th day of April, A. D. 1867, to remove the county seat of said county from the town of Beardstown to the town of Virginia in said county. The act under which said elec-

tion was held provides that any citizen of said county who may legally vote at said election may contest the legality and validity of said election by giving his notice in writing of his intention so to do to any other citizen of said county who may legally vote at said election in opposition to the vote cast at said election by the person contesting, and said contest shall be conducted in compliance with the existing laws of this state with reference to the contest of elections for county officers, in all respects so far as the same may be applicable.

This proceeding was commenced in the mode prescribed by the statute, and was heard before three justices of the peace in Cass county, who made their certificate in favor of the contestant, H. H. Littlefield, who contested said election on behalf of those who voted against the removal of the county seat from the town of Beardstown, and thereupon the contestee perfected his appeal under the statute to the circuit court of Cass county.

At the March term, A. D. 1868, of the Cass county circuit court, the contestee filed his petition, verified by affidavit, praying for a change of venue from said circuit on account of the prejudice of the judge of said circuit court, and on motion of the contestee the court awarded a change of venue in said proceeding.

Affidavits on file show that after the court had determined to award a change of venue in said cause against the protest of the contestant, that the contestant, by his counsel, consented that if the venue was to be changed, the cause should be sent to the county of McLean, although that circuit was not the next nearest circuit.

The papers in the cause were accordingly sent to the circuit court of McLean county, and were filed in that court on the 28th day of March, A. D. 1868. At the September term, 1868, of the McLean circuit court, the parties appeared, and the contestant, by his counsel, entered his motion to remand the cause to Cass county, which motion, without being heard by the court, was withdrawn by the contestant, and thereupon the contestant filed his affidavit and motion for the continu-

ance of said cause, which motion the court was about to overrule, and the motion to continue was by consent of parties withdrawn, and the cause set for hearing on the second day of the next December term of said court.

On the second day of the December term, A. D. 1868, of said circuit court, the parties again appeared, and the contestant by his counsel entered his motion to remand this cause to the circuit court of Cass county, for the reason that the venue of said cause was improperly changed.

The contestee insists: First, that the venue was properly changed. Second, that the motion comes too late, for the reason that the contestant has submitted to the jurisdiction of the McLean circuit court, by filing his affidavit and motion and consenting to a continuance and setting the cause for hearing.

If the court has no jurisdiction of the subject matter of the controversy between the parties, no consent can confer the jurisdiction. If the court has jurisdiction of the subject matter of the controversy, then all irregularities in the manner of taking the change of venue are waived by the motion to continue, and the consent to set the case for hearing at the present term of this court.

It is only necessary, therefore, to consider whether the circuit court of Cass county had power to award a change of venue in this case.

The first section of the "Venue Act," revised statutes of 1845, page 527, provides as follows:

"If either party in any civil cause in law or equity which may be depending in any circuit court shall fear that he will not receive a fair trial in the court in which the action is pending on account that the judge is interested or prejudiced, or is related to or shall have been of counsel for either party, * * * such party may apply to the court in term time, or the judge thereof in vacation, by petition, setting forth the cause of the application, and praying a change of venue, accompanied by an affidavit verifying the facts in the petition stated, and such court or judge, reasonable notice of the ap-

plication having been given to the other party or his attorney, shall award a change of venue to some county where the causes complained of do not exist."

It is insisted that the proceeding to contest an election is not a civil cause in law or equity within the meaning of this act, and therefore that there is no authority of law for changing the venue in such a proceeding.

There is no special act of the legislature authorizing such change, and if allowed at all, it must be done under the provisions of the act above cited.

The question presented seems to be entirely new. It has been argued with great ability on both sides by counsel who have made diligent search for authority exactly in point on this question, but no case has been found in which this exact question has been determined.

I am not aware that it has ever been decided. If it has, I have been unable to find such case, and if such case exists, I am persuaded that the diligence and earnestness of the counsel in this cause would have produced it for examination.

Is this a "case" in law or equity? If it is, the venue can be changed under the provisions of the act above cited. If it is not a "case" in law or equity, then I know of no provision of law for changing the venue in such a proceeding.

When this cause was first submitted to me, I was of opinion, and so announced to the counsel, that any question to be tried and determined by a *court*, was necessarily a "case" in law or equity. In the section of the statute above quoted the words "civil cause," "action" and "case," are all used as meaning the same thing.

An "action" is defined to be the "form of a suit given by law for the recovery of that which is one's due, or it is a legal demand of a man's right."

On the contrary, it would seem that a mere "proceeding" is the determination of a question by a person or persons designated by law to determine the same, who are not judicial officers.

The case of *Lighty v. French*, 9 Ind. 475, is a case of con-

tested election under a statute very similar to that of this state. In that case the court, after determining that no appeal would lie in such a case under the laws of that state, cite approvingly the ingenious argument of the counsel, thus:

"Appeals to the supreme court are authorized by the provisions of the practice act in civil and criminal cases only. A proceeding to contest an election is neither the one nor the other, but simply what it is named—the contesting of an election."

It was not necessary to the decision of the question then before the court to adopt that line of argument; the statute allowed no appeal, and there the argument might have stopped.

I was not inclined to adopt the reasoning of the court after the decision of the case, for it seemed impossible to me to define a question pending before and to be decided by a court except to designate it as a "case" in law or equity.

I was at a loss to see why the "contesting of an election" is not the "form of a suit given by law for the recovery of that which is one's due" as much as the demand by one man of another of so many dollars and cents is a civil cause in law.

Since announcing the above views, and before the disposition of the case, the supreme court filed their opinion in the case of *Moore v. Mayfield*,¹ error to Morgan county.

I regard this case as decisive of the question now before this court. It is here clearly decided that the proceeding to contest an election is not a "case" in law or equity; that it is "merely a statutory proceeding for recanvassing the votes cast at an election, in which the illegal votes may be rejected, and those which are legal may be counted and the result ascertained." It must, therefore, be the duty of the court designated by law to make such re-canvass to perform this duty itself, and it cannot transfer such duty to another court. If, then, the proceeding to contest an election is not a "case" at law or in equity, I am of opinion that the first section of

¹ 47 Ill. 167.—Ed.

the venue act does not authorize a change of venue in such cases.

And as there is no special act of the legislature authorizing such change of venue, I am of opinion that the circuit court of Cass county had no power to award a change of venue in this case, and consequently such order could give this court no jurisdiction to hear and determine this case on its merits.

It becomes my duty to conform whatever imperfect views I may have formed on this question to the judgment of the supreme court, which I most cheerfully do. The cause is remanded to Cass county.

(Circuit Court of Cass County.)

H. H. Littlefield

vs.

William Green.

(May Term, 1869.)

1. **ELECTIONS—FRAUD—THROWING OUT ALL VOTES EXCEPT THOSE PROVEN LEGITIMATE OUTSIDE RECORD.** In an election to remove a county seat, 2820 votes were cast in favor of removal in a precinct in which there were but 453 registered voters, *held*, that all the votes in the precinct would be thrown out except those proven outside the record, the circumstances of the case rendering it impossible to separate the legal from the illegal votes so as to count in the votes of the 453 legal voters, even though there were no votes cast in the precinct against removal.
2. **ELECTIONS—VOTERS NATURALIZED IN COUNTY COURT.** Votes cast by persons naturalized in the county court are illegal.

Contested election. Heard before Judge Arthur A. Smith. The facts are stated in the opinion of the court.

J. Henry Shaw, attorney for contestant.

SMITH, J.:—

On the 9th of April, A. D. 1867, an election was had for or against the removal of the county seat of Cass county, from Beardstown to Virginia, in said county.

The election was authorized by an act of the legislature passed that year.

The act provides that any citizen of said county, who may legally vote at said election may contest its legality, by giving a notice in writing of his intention so to do, to any other citizen of said county who may legally vote at said election in opposition to the vote cast by the person contesting, and said contest shall be conducted in compliance with existing laws of this state, with reference to the contest of elections for county officers, so far as the same may be applicable, R. S. 1845, chap. 37. This proceeding was commenced in the mode prescribed by statute, and was heard before three justices of the peace in said county, who made their certificate in favor of H. H. Littlefield, the contestant, and thereupon Green, the contestee, perfected his appeal to the circuit court of Cass county.

The principal contest was made on the returns from the Virginia precinct. It was claimed that illegal votes were cast in the Beardstown and Lancaster precincts; but no particular irregularity was shown to have occurred in the election.

It was admitted on the argument that if the Virginia vote was thrown out the majority would be against removal; if counted there would be a majority for removal. Virginia precinct cast at said election 2820 votes, and the judges of said election certify that 2820 votes were cast for removal, and none against removal. That precinct had at the date of the election an entire population of between 1700 and 1800, and about 450 legal votes. The names of the first 668 voters, as appears from the poll books, appears to have been registered and voted in alphabetical and numerical order. As for example, John Needham is the first name that appears upon the poll books, as having voted on the 9th day of April. His name appears first upon the register under "N," and the next name on the poll books that begins with "N" is registered immediately under the name of Needham, and so on all through these poll books and registers up to about No. 668. The voters appear to have been registered and voted in this

exact alphabetical and numerical order. From 668 to 955, the voters appear to have voted in alphabetical order from "A," running through the alphabet to "Z," and then from "Z" to "A" in the inverse order. From 955 to 985, this order is changed, and the names on the poll books appear from 4 to 6 together, commencing with the *same letter* of the alphabet. From 986 to 1191, the alphabetical order is resumed and this continues with an occasional break through the entire poll books to 2820.

It was not however claimed upon the argument by the contestee, that the names upon the poll books are genuine after 668, but that up to that number they are legal voters. But the proof showed that there were but 453 legal voters in the entire Virginia precinct, and that the names of these voters, instead of appearing first upon the poll books, read in consecutive order as they should have done, were scattered through the entire poll books from No. 1 to No. 2500.

Take, for example, the name of L. B. Freeman, who swears that he voted about 2 p. m., his number is 480. H. D. Freeman states that he voted not long after, and his name is 2572, and that J. M. Stribling and Joseph Hunt voted about the time he did and their numbers are 2571 and 2573. The Freemans could not have voted so near together in point of time and their numbers be so far apart; and then H. D. Freeman, Stribling and Hunt were legal voters and their names should have appeared within the 453 or at least within 667, upon the theory of contestee that the first part of the poll books are genuine up to No. 667, and the balance fabricated, and not one of the witnesses are able or willing to explain how the names of those legal voters got into company of those that it is admitted are spurious and fictitious.

It was insisted upon the argument by contestee that the poll book of the Virginia precinct should be taken as evidence that as many as 400 or 450 legal voters had voted at that election for removal, and the question is here presented, whether the irregularities and frauds appearing upon the face of the poll books in connection with the other testimony

in the case destroys them as evidence of what they purport to be.

It is undoubtedly the rule that if the canvassing court can separate the legal from the illegal votes and reject the illegal ones, and that mere irregularities in the manner of conducting an election as a fraud on the part of the officers, will not vitiate, unless it is of so gross a character as to destroy all means of ascertaining the true results. *Piatt v. The People, ex rel. Am. Cent. R. R. Co.*, 29 Ill. 55, 72; *People v. Cook*, 8 N. Y. (4 Seld.) 68.

Our own supreme court has laid down this rule, "If an irregularity of which complaint is made, is shown to deprive no legal voter of his rights, or admitted a disqualified person to vote, if it casts no uncertainty on the result and has not been occasioned by the agency of a party seeking to derive a benefit from it, it may be overlooked. *Piatt v. The People*, 29 Ill. 72. *Angel & Ames on Corporations*, 94.

How then does the vote of the Virginia precinct appear in the light of this law. Do the irregularities and frauds admitted to have been practiced, place the true result in uncertainty; were disqualified persons admitted to vote, and was this procured by those seeking to derive benefit from their own frauds? It was admitted that out of the 2820 votes cast in that precinct for removal, that not more than 453 could be legal votes. But it is insisted by contestee that inasmuch as they have proved that upwards of 400 legal votes were in the Virginia precinct at that time, that they should be counted for removal.

But which 400 names on the poll book or ballots can the court count as legal votes? The first, second, third or fourth 400? For it is in proof that a large number of the names of those claimed to be legal votes do not appear upon the poll books within the first 400, or the second 400, but many of them appear as high up as 2,500.

It would be impossible, then, for the court to count the first 400 names on the poll books as legal votes. Where shall the court commence to count the legal votes, and where shall

it draw the line between the legal and illegal votes? Do not these facts cast an uncertainty over the whole result? But how do the poll books, registers and ballots appear in the light of the testimony of the officers who conducted the Virginia election.

It appears from the evidence that the Virginia interest was determined from the first to carry the election for removal at all hazards. And hence two of the board of registry, after acting two days, declined to act further; one for the reason that he would not be a party to the frauds that were about to be perpetrated, and the other for the reason that he could do more off the board than he could do on it, to further the ends to be obtained. Other men were selected who were not so tenderfooted upon questions of honesty, and the registers were completed, and they contained as the board say, 2820 names of legal voters in a precinct that contained about 1700 inhabitants all told.

And when one of this board was asked if any other person assisted in making the registers, he refuses to answer because it may subject him to a criminal prosecution. And when asked what guide they had to enable them to make the corrected registers for the Virginia precinct, he refuses to answer for the same reason.

On the day of election these officers shut themselves up in a school house, an aperature in the window is prepared through which to receive the ballots, and thus these officers of the law, after having solemnly sworn "that they would studiously endeavor to prevent fraud, deceit and abuse in conducting the election;" with their false and fabricated registers before them, commenced receiving the 2820 votes that they certify were cast on that day for removal in the Virginia precinct, when they must have known there were not to exceed 453 legal votes in the precinct. And when one of the judges is asked if 2820 different persons actually presented themselves to vote on that day he refused to answer because it might subject him to a criminal prosecution. And when asked how many names were on the poll books when

the polls closed he refuses to answer for the same reason. And when asked how many *bona fide* ballots were counted out of the box after the polls closed, he refuses to answer because it might subject him to criminal prosecution. And when asked whether any other persons acted as clerks in preparing the returns on the night succeeding the election in the Virginia precinct, he refuses to answer for the same reason. This is substantially the character of the testimony of all the officers conducting this election on this point.

One of them swears that he cannot account for the names appearing in alphabetical order on the poll books from "A" to "Z" and from "Z" to "A," but thinks that men voted in that order, a thing impossible and incredible. Another of these judges of election swears that they quit counting the ballots about midnight and lay down on the benches and slept until daylight; that they left the ballot-box sitting there *unsealed*; at daylight, they resumed counting, and went to breakfast at the usual hour and left the ballot-box in the house—other persons were in the house. This witness when asked whether he numbered all the ballots that were put in the ballot-box that day refuses to answer because it may criminate him, and asks *the protection of the court*; and yet this judge of election says he was the one whose duty it was to receive the ballots and put them into the ballot-box.

He refuses to answer whether he put in 1000 ballots, because it may criminate him, but thinks he may have put in 800—is quite certain he put in 600, but can't say that they were all legal votes. Another of these election officers swears that the names of the voters may have been called off by some person having a list of them outside and the ballots handed in through the hole by this person. Another witness swears that he voted through a hole in the window and could not see what was going on inside. And this is the class of testimony running through a thousand pages or more of manuscript, from which the court is asked to rescue the legal votes, and decide that at least 453 legal votes were cast for removal in the Virginia precinct. The difficulty is, that

these registers, poll books, ballots and testimony in connection therewith are so contradictory, mysterious, evasive, false and fraudulent that they are utterly unworthy of credit. If they could be personified and put upon the stand as witnesses, and made to speak their contents, they would not be believed for a moment in the lowest and most insignificant court in the country.

I think it may be fairly inferred from the evidence that some time before the election, the leading spirits of Virginia including many of her representative citizens, concocted a plan to carry this election by fraud or unfair means; and their only excuse was that they feared that Beardstown would be guilty of the same thing; and hence a board of registry was selected to carry out this fraudulent purpose. The ballot box on the day of election was stuffed with 2370 illegal votes; the poll books and the registers have on almost every page these badges of fraud; and the officers of this election have the effrontery to come forward and attempt to sustain it by the most unblushing testimony that was ever heard in a court of justice. The law will presume everything against a set of men who are shown to be pursuing such a fraudulent and dishonest course.

But it is insisted by the contestee that it is in proof that 453 legal voters voted in the Virginia precinct for removal, and that they ought to be counted, notwithstanding the frauds perpetrated by the officers of the election—that a legal voter ought not to be disfranchised on account of the misconduct of an election officer. But there is no proof outside of the poll books that 453 legal voters actually voted at said election.

There is some proof that this number resided in the precinct at that time, but the court cannot presume that they voted on the 9th of April, much less that they voted for removal. There is evidence *dehors* the poll books that about 50 legal voters did actually vote for removal in the Virginia precinct, and they should be counted; but there is no evidence except the poll books that the 400 voted at all. Their

names might have been furnished, for all that appears, the same as the 2370 fictitious ones that were voted that day.

As I have remarked, the irregularities at the Virginia election, the fraud on the part of the officers conducting it, and those who were to derive a benefit from its success; the unaccountable manner in which the names appear upon the poll books, the contradictory and unsatisfactory testimony introduced to support them, and the refusal on the part of the perpetrators of this fraud to give the court any insight into this labyrinth of uncertainties, renders these poll books and ballots entirely unworthy of credit, and renders it impossible to count the legal votes and reject the illegal ones.

It is probable that Virginia upon a fair and honest vote, could remove the county seat; such a vote would be sanctioned by the law of the land, and indorsed by the moral sense of the community. Were I, however, to declare the result in favor of Virginia, upon these facts, it would indeed have the force and effect of law, *but it would not be law*. It would be allowing the majority by fraud to trample upon the rights of the minority. It would be an indorsement by a court of justice of one of the most stupendous frauds of modern times.

It is insisted by the contestee that there were frauds committed in the Beardstown precinct, and so there were; but this did not justify fraud on the part of Virginia. But the court cannot offset one fraud against another and give the victory to the one committing the greatest fraud. But no fraud on investigation was charged upon the officers conducting the election in Beardstown. But it was proved that about 47 illegal votes were cast against removal by thirty-day men and those naturalized in the county court, and they must be thrown out.

So with Lancaster precinct, 194 illegal votes were cast for removal, and these must be thrown out. The court in these two cases has no difficulty in separating the true from the false. After rejecting the poll books, and other record evidence of the Virginia precinct, and allowing it all the legal

votes proved *dehors* the record (about fifty), it leaves a majority against removal of two hundred and twenty-seven votes.

It is due to the importance of this contest, to the able and distinguished counsel on both sides, and to the earnestness and zeal with which counsel for the contestee have urged their points, that I should have considered this contest well, carefully, and at length; and, while I may have erred, I have a consciousness of having done right.

(*Supreme Court of Illinois.*)

Gregory

vs.

Wilson.

(1874.)

WRIT OF ERROR—ONLY LIES WHERE NO OTHER MODE OF REVIEW.

A writ of error will not lie to review a judgment of a county court where the statute provides for an appeal to the circuit court.

Motion to dismiss writ of error to Jefferson county. No. 46.

SCHOFIELD, J.:—

This is a motion to dismiss the writ of error, on the ground that a writ of error does not lie from this court to the judgments of county courts in such cases. The judgment was rendered under the act of 1872, enlarging the jurisdiction of county courts. That act provides that appeals shall be taken from the judgments of the county courts to the circuit courts; and that writs of error may be prosecuted on such judgments from the circuit courts. A writ of error only lies from the court to the judgments of inferior courts where no other mode of reviewing such judgments is provided by law. The writ must be dismissed

(Supreme Court of Illinois.)

T. McNeeley

vs.

John K. Wright.

(1874.)

WHEN DISMISSAL OF APPEAL WILL BE SET ASIDE. An order dismissing an appeal for failure to file appeal bond within time fixed by order of court below will be set aside on showing.

Motion to set aside order dismissing appeal from Washington county. No. 156.

CRAIG, J.:—

The appeal in this case was dismissed on account of the failure of the appellant to file an appeal bond within the time specified by the order of the court below. A motion is now made to set aside the order of dismissal. We think sufficient grounds have been shown, and the order will be set aside.

(Supreme Court of Illinois.)

Howell, Millsbaugh & Co.

vs.

Jonah Morlan.

(1874.)

DISMISSAL OF APPEAL FOR LACK OF JUDGMENT. An appeal will be dismissed where the record proper does not show a judgment even though the bill of exceptions show a judgment was rendered.

Motion to dismiss appeal from White county. No. 165.

SHELDON, J.:—

In this case there was a motion to dismiss the appeal because there was no finding of judgment. The record proper merely shows a verdict, a motion for a new trial, and then

a prayer for an appeal. It does not show that any judgment was rendered upon the verdict. It is true the bill of exceptions sets forth that a judgment was entered, but the statements of a bill of exceptions cannot supply the want of a judgment entered on the record proper. The motion will be allowed, and the appeal dismissed.

(Supreme Court of Illinois.)

James Harrington, et al.

vs.

Henry Stees.

(1874.)

WHEN CAUSE WILL NOT BE REMANDED.

Motion to set aside decision and remand cause. Error to Edwards county. No. 201.

SHELDON, J.:—

This is a motion to set aside the decision and remand the cause. We have considered the suggestions on both sides, in favor of and against the motion, and we do not think there is any sufficient reason for remanding the cause, and the motion will be overruled.

SCOTT, J.—I desire to say that I do not concur in the opinion of the court. I believe there is ample reason shown for remanding the cause.

(Supreme Court of Illinois.)

Charles H. Roberts, et al.

vs.

Calvin Stigleman

(1874.)

DISMISSAL OF APPEAL ON ACCOUNT OF DEFECTIVE BOND.

Motion to dismiss appeal. Error to Jersey county. No. 74.

SCHOFIELD, J.:—

This is a motion to dismiss the appeal for want of a sufficient appeal bond; the bond is entirely defective, and the appeal will be dismissed.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

William A. Paulsen, et al.

(October, 1907.)

BAIL—SURRENDER OF PRINCIPAL—POWER TO MAKE, OUTSIDE OF COUNTY WHERE PRINCIPAL BOUND TO APPEAR—SECTION 14, DIV. III, OF CRIMINAL CODE CONSTRUED. A surrender to the sheriff of the county where the principal of a bail bond is required to appear made *outside* of said county is effective to release the sureties on the bond of their liability; for section 14, div. III, of the Criminal Code (S. & C. Ann. St., p. 1365) which provides that "the surrender shall be made to the sheriff of the county where the principal is required to appear," excludes the idea that the surrender must be made within said county.

Suit on bail bond. Motion to direct verdict. Heard before Judge Thomas G. Windes.

Statement of facts:

At the October, 1900, term of the criminal court of Cook county William A. Paulsen was convicted of the crime of embezzlement. He thereupon sued out a writ of error in the supreme court, and upon his motion an order was entered in that court on December 11, 1900, directing the sheriff of Cook county to admit him to bail in the sum of \$5,000, upon his entering into a recognizance conditioned as provided in said order with William M. Booth and Edwin A. Casey as sureties.

Pursuant to said order of December 11, 1900, said Paul-

sen as principal and said Booth and Casey, as sureties, did execute their certain recognizance in the penal sum of \$5,000 for the use of the people, etc., which said recognizance was conditioned as provided in and by said order. Said recognizance was duly taken and approved by the sheriff of Cook county on December 12, 1900.

On February 21, 1902, the supreme court affirmed the judgment of the criminal court of Cook county. On April 21, 1902, said supreme court allowed a writ of error from its judgment of affirmance to the United States supreme court, which was to operate as a supersedeas until it was disposed of by the supreme court of the United States.

In October, 1904, the supreme court of the United States dismissed the writ of error.

On Dec. 12, 1904, Casey, one of the sureties delivered to Thomas E. Barrett, as sheriff of Cook county, a certified copy of the recognizance and appointed him as his (Casey's) agent to arrest Paulsen. The next day (the 13th), by virtue of this authority, the sheriff by one of his deputies, arrested Paulsen in DuPage county and made a return upon the recognizance to the effect that Paulsen had been taken into custody by him. On December 14, 1904, while in DuPage county in the keeping of the deputy sheriff of Cook county, Paulsen filed a petition in the circuit court of the 16th judicial circuit of the state of Illinois, for a writ of habeas corpus, directed against said sheriff Barrett, etc.; said writ was made returnable first on December 20, 1904, and thereafter was continued to December 27, 1904. The habeas corpus writ was served on the sheriff and the latter pursuant thereto produced Paulsen before the judge of the circuit court of the 16th circuit, making a return in which he stated that he held Paulsen by virtue of a certain surrender on a recognizance. On Dec. 27, 1904, Paulsen was discharged from custody after a hearing on the habeas corpus writ. He had been continuously in jail under the writ since its issuance.

On December 15, 1904, there was filed with the clerk of

the criminal court of Cook County the order of affirmance of the supreme court of Illinois and on December 16, 1904, there was filed the order of December 11, 1900 (directing the sheriff of said Cook county to admit said Paulsen to bail) and also the recognizance in question, which had been executed by said Paulsen, as principal, and Booth and Casey as sureties, on December 12, 1900.

Immediately upon the filing of said recognizance, on December 16, 1904, there was entered in said criminal court of Cook county an order of forfeiture against both said principal, Paulsen, and said sureties, Booth and Casey.

Immediately thereafter and within the time allowed by law, said Paulsen and Casey (said Booth being dead) made motions to vacate the order of December 16, 1904, declaring a forfeiture of said recognizance and in support of said motions filed certain affidavits.

Thereafter on January 22, 1906, an order was entered denying said motion to vacate said forfeiture, and directing said principal and surety to plead to the writ of *scire facias*. Principal Paulsen and surety Casey thereupon pleaded to said writ of *scire facias*, and a trial was had.

John J. Healy, state's attorney, *Hobart P. Young*, and *Charles F. McKinley*, for the People.

Att Brothers, for William A. Paulsen.

Moran, Mayer & Meyer, for Edwin A. Casey.

WINDES, J.:—

I am somewhat surprised at the authorities cited on behalf of the plaintiff here being so strict in holding a surety on a recognizance. They certainly are far more strict than the usual authorities on sureties on bonds of other kinds. I think that the decision in this case turns upon the construction of the section of the statute here which to my mind has not been passed upon directly by any of the decisions cited by counsel.

Now there is no question but that the sureties may go anywhere within the state and arrest the principal and bring

him to the sheriff of the county where he is to appear and surrender, and in that way relieve the surety from any liability upon the recognizance. Here the sheriff is made the agent of the surety to do that thing. At the same time, according to the evidence here, he has acted as sheriff of Cook county outside of the county. Section 307 referred to says: "The surrender shall be made to the sheriff of the county where the principal is required to appear." That does not say that the surrender shall be made in the county where the principal is bound to appear, but to the sheriff of the county where the principal is required to appear, so I take it that a fair construction of the statute is under the facts here that the moment this surrender—I mean the moment this arrest was made by the sheriff of Cook county, his deputy acting for him, that moment the sheriff of Cook county was in possession of the principal the condition of the bond was complied with. If the statute said that the surrender must be made within the county or in the county where the principal is required to appear, that would be another thing, but when the agent and the sheriff are both made one person it seems to me that there is a sufficient surrender to comply with the statute here by the principal, and that being my view of it I will give the instruction for the defendant and refuse the instruction for the plaintiff.

(Court of Cook County.)

Clingman

vs.

World's Columbian Exposition, et al.

(—, 1893)

1. **CONTEMPT—VIOLATION OF INJUNCTION—DIRECTORS ORDERING WORLD'S COLUMBIAN EXPOSITION CLOSED ON SUNDAY.** All the directors who voted to keep the World's Columbian Exposition closed on Sunday in spite of an injunction to the contrary are in contempt of court.
2. **SAME—MITIGATING CIRCUMSTANCES.** A director, who voted in favor of the resolution because the official attorney of the fair

told him that through court proceedings the injunction would be modified so that the vote would not result in a violation of the injunction, has mitigating circumstances in his favor but is nevertheless in contempt as he took no further steps to see that the injunction was not violated.

3. SAME—EXECUTIVE OFFICERS—ADVICE OF COUNSEL. Executive officers who followed the directions of the board of directors upon being advised by counsel that the injunction had lost its effect will be discharged.
4. SAME. An executive officer who followed the directions of the board of directors because he was told to do so is in contempt.

Motion to attach for contempt.

STEIN, J.:—

On the 14th day of July last, the board of exposition directors adopted two resolutions, prefaced by four preambles, the meaning, intent and object of which was to keep thereafter the World's Fair closed on Sundays. The persons voting for the resolutions did so without any one advising them that the injunction which forbade the closing of the fair on Sunday was no longer in force. Of the respondents now before the court, Lyman J. Gage, Charles L. Hutchinson, Charles Henrotin, Andrew McNally, William D. Kerfoot and Victor F. Lawson voted for the resolutions and Adolph Nathan voted against them. The resolutions in terms provided that a certified copy thereof and of the preambles be transmitted to the council of administration, consisting of Messrs. Higinbotham and Schwab, members of the board of directors, and St. Clair and Massey, members of the national commission. Although it does not expressly appear, it is fair to presume from the proofs that the certified copy of the preambles and resolutions reached the council of administration on or about the 22nd day of July. On that day, the council, acting upon and in pursuance of the resolutions, ordered all buildings within the exposition grounds and the gates of admission to be closed on July 23rd, and directed a copy of the order to be forthwith sent to the director general, George R. Davis, with instructions

to enforce the same. Accordingly, the grounds were closed to the public on Sunday, the 23rd day of July.

That this was a violation of the injunction issued by the court is beyond a doubt. It is also clear that the persons primarily and principally liable for the violation are the directors who voted for the resolutions; without the passage of the resolutions nothing that followed would have happened; it is the directors who manage and control the affairs of the corporation. The council of administration and director general are merely executive officers, carrying out the orders given them by their superiors.

At the time the injunction was applied for the directors made no objection. When it served their purposes and was in their way as an obstruction to Sunday closing, they simply ignored it. There is nothing in the proofs which tends to mitigate or excuse their act in defying and overriding the process of this court. It is an offence which cannot be permitted to go unrebuked. In ordinary cases the facts constituting the breach of an injunction are known to none but the immediate parties; yet, when the breach is brought to the knowledge of the court, the law is swift to punish the offender. Here the violation of this injunction was as public and notorious as it possibly could be; it was committed by men of the highest standing and intelligence in the community, who, of all others, should have scrupulously obeyed the law and thereby set an example to the rest.

It is the sentence of the court, and it is hereby ordered, that Lyman J. Gage, Charles L. Hutchinson, Charles Henriotin, Andrew McNally and William D. Kerfoot be each fined one thousand dollars and stand committed to the county jail until such fine is paid. As to Adolph Nathan, who voted against the resolutions, the rules are discharged.

The case of Mr. Lawson stands upon a somewhat different footing. He also voted for the resolutions, but under mitigating circumstances. As appears from his answer, he was told by Edwin Walker, the solicitor general of the exposition, that through some court proceedings the injunction would be modified or dissolved, and that the contemplated

action of the directors in adopting resolutions would not result in any violation of the injunction and would not be carried into effect until after a modification or dissolution. Thus believing, he voted for the resolutions. Thereupon, it became his duty to see to it that they would not be enforced until the injunction was out of the way. But he did nothing of the kind, so far as appears. For the contempt committed by him he is fined one hundred dollars, to stand committed with the others.

Before the council of administration took action upon the resolutions by way of directing the director general to close the fair, they applied to Mr. Eddy, law partner of Mr. Walker for advice. He advised them that by reason of the people of the state having been made a party to the suit, the injunction had lost its effect. While the court is of opinion that the advice thus given was unsound, yet the members of the council acted upon it in good faith. They swear that had they not been so advised, they would not have ordered the closing of the fair. As to them, being Messrs. Higinbotham, Schwab, St. Clair and Massey, the rule is also discharged. Neither Higinbotham nor Schwab voted for the resolutions and St. Clair and Massey are not directors.

The remaining respondent is Mr. Davis. If his excuse that he only did what he was told to do were to avail, a ready method would be provided for evading every injunction hereafter to be issued; still his guilt is much less aggravated than that of the directors, and he also was informed that before actually closing the fair on Sundays, steps would be taken to get the injunction modified or dissolved and he believed this had been done when he ordered the fair closed. A mere belief, however, was not sufficient; it was his duty to inquire and ascertain whether in point of fact the injunction had ceased to be operative or to obtain the advice of counsel. He did neither, but took it upon himself to close the fair and thereby committed a breach of the injunction. For this breach he is fined two hundred and fifty dollars and to stand committed until the fine is paid.

(Supreme Court of Illinois.)

George W. Brackett

vs.

The People, ex rel.

(June Term, 1874.)

BILL OF EXCEPTIONS—STRIKING FROM FILES. A bill of exceptions will not be stricken from the files even though not filed in time where it was presented to the judge and was not returned in time, and the party used due diligence in trying to obtain it.

Motion to strike bill of exceptions from files. Appeal from St. Clair county.

There is a motion in this case to strike the bill of exceptions from the record. It is true the bill of exceptions was not filed within the time ordered by the circuit court. It appears, however, that the appellant had prepared it in time, and presented it to the circuit judge; but, for some reason he did not return it in time to file it, though several times asked for it by appellant. We think the appellant showed sufficient diligence, and the bill of exceptions will have to be retained. The motion is overruled.

(Superior Court of Cook County. In Chancery.)

Clingman

vs.

World's Columbian Exposition, et al.

(August 31, 1893.)

1. **PUBLIC PROPERTY—DIVERSION OF—WHEN ONE OF GENERAL PUBLIC CAN ENJOIN.** While it is true that one who suffers no special damage cannot enjoin public authorities from diverting land from the public use for which it was acquired, yet where relief is prayed against a private corporation to whom such land may have been turned over, one of the general public can maintain a bill in equity in his own name in behalf of all.

2. **PARKS—DIVERSION FROM PUBLIC PURPOSE—POWER OF LEGISLATURE.**
The legislature has the right to divert the use of land the fee of which has been acquired for a public park to other than park purposes.
3. **PARKS—WHAT DOES NOT CONSTITUTE A DEDICATION OF LAND FOR.**
The declaration of the legislature that land is to be used for park purposes for the "rest and recreation of the people and free forever" does not in law amount to a dedication of the property.
4. **DEDICATION—DEFINED.** A dedication is an appropriation of land for some public use made by the owner and accepted for such use by and on behalf of the public. This implies that there must be a giving by one party and an acceptance by another.
5. **PARKS—RIGHT OF LEGISLATURE TO AUTHORIZE MUNICIPAL CORPORATION HOLDING PARK LANDS IN FEE TO CHANGE USE OF OR SELL SAME.** Where lands acquired by condemnation or otherwise are held by a municipality in fee for park purposes, the legislature can authorize a change of use of or a sale of the same.

Motion to dissolve temporary injunction. The facts are stated in the opinion of the court. Heard before Judges Edward F. Dunne, Theodore Brentano and James Goggin.

William E. Mason, for complainant.

T. A. Moran, Levy Mayer, Walker & Eddy, Sidney Smith, John Barton Payne, George W. Miller, David Fales, William Street and T. H. Gault, for various defendants.

PER CURIAM:—

This is a motion to dissolve the injunction heretofore granted in the above entitled cause, restraining the defendants, their agents, etc., from closing on Sundays that part of the South Park now occupied by the World's Columbian Exposition.

The motion to dissolve is based upon the bill of complaint and the answers filed thereto. Able and exhaustive arguments have been heard upon the same.

In the argument of counsel for the complainant, he disclaims for his client any rights or standing in court on the ground of being a stockholder. It becomes therefore, unnecessary for us to consider him in that capacity.

It remains for us to determine but two questions, to-wit:

First: Has the complainant in his capacity, solely as tax payer and citizen, such a standing in court as entitles him to bring this suit for an injunction to protect the alleged rights of himself and the general public, or must the suit be brought by the attorney general of the state, or in his name or with his consent? And if it is determined by this court that the complainant has such standing in court,

Second: Has the complainant the right to an injunction restraining the company from closing the gates of the park on Sundays, because Jackson Park was created by the act of the legislature of Illinois, approved February 24th, 1869, a "public park for the recreation, health and benefit of the public, and free to all persons forever" (1 Private Laws of Ill. 1869, page 358), and paid for by the taxation of property in South Chicago, Hyde Park and Lake. Or differently stated, was it not beyond the power of the state legislature, or the park commissioners, to pass any act or ordinance closing the park on Sundays or any other day.

It is contended on the part of defendants that the complainant, as an individual or a mere member of the general public, cannot come into a court of equity and claim to represent the general public, and that the suit must be brought by the attorney general of the state representing the public at large. They urge that a citizen or taxpayer who suffers no peculiar damage or injury different from the general public, by reason of the diversion of public property from the use for which it was intended at the time of its acquisition, cannot maintain a bill in his own name for any injunction to prevent such diversion of use.

This is undoubtedly the law in cases where it is sought to enjoin public or municipal authorities at the suit of a mere member of the general public. In this case, however, the writ is not invoked against the public authorities having in their charge or control public property, but it is prayed for as against a private corporation, to-wit, the World's Columbian Exposition, to whom was surrendered and given over a

public park by the park commissioners under a special act of the general assembly.

The case of *Davidson v. Reed*, 111 Ill. 167, seems directly in point. That was a bill in equity filed by a private individual to restrain another private individual from meddling or interfering with certain graves in land which had been dedicated to the public to be used as a place of burial of the dead. It was held that the complainant as a private individual could maintain the bill in his own name for the benefit of all. To the same effect is *Maywood Company v. Maywood*, 118 Ill. 61.

It appearing from the averments of the bill that the complainant has a common interest in preventing a diversion of the use of a public park to private purposes, he can in his own name maintain the suit, and it is not necessary that the attorney general be a party thereto.

Moreover, the attorney general, having reconsidered his motion to withdraw his appearance from the case, must be held to abide by his original appearance, still on file, which prays for the same relief as sought by the complainant. Such appearance has the same force and effect as if the attorney general had primarily moved in this suit.

There remains for consideration the vital question in the case: Had the legislature the power to authorize the South Park commissioners to turn over to the World's Columbian Exposition Company the land embraced in Jackson Park and in the Midway Plaisance, as provided in section three (3) of the act of August 5th, 1890 (Laws of Ill. 1890, page 4), which reads as follows:

"Sec. 3. In case the site or sites for the holding of the said World's Columbian Exposition, as finally located and fixed by the authorities in charge thereof, shall include the whole or any part of any public park which is, or may be, under the control and management of park commissioners, then and in that event it shall be competent, and express authority for that purpose is hereby granted to the park commissioners having the control and management of such public park, to allow the use of the same or any part thereof, for

the purposes of said World's Columbian Exposition, upon such terms and conditions as may be agreed upon between the said park commissioners and the authorities having the management of said exposition."

It is conceded that if the legislature had such power, the World's Columbian Exposition, pursuant thereto, obtained from the park commissioners, by their ordinance, the right to occupy and enclose Jackson Park and the Midway Plaisance from the first day of October, 1892, until the first day of January, 1894. Sec. 5, of the ordinance of South Park commissioners, adopted September 19th, 1890.

It is urged with great force by the learned counsel for complainant, that the act creating the South Park commissioners expressly provides: "Which said land and premises, when acquired by said commissioners, as provided by this act, shall be held, managed and controlled by them and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever, subject to such necessary rules and regulations as shall, from time to time, be adopted by said commissioners and their successors, for the well ordering and government of the same." Sec. 4, of the act approved February 24th, 1869, creating South Park commissioners (1 Private Laws Ill. 1869, page 358).

And it is forcibly contended by the learned counsel, that the language of the act clothes the property acquired by the commissioners with a public use; that it amounts, in the language of learned counsel, to "a public dedication;" and that the public enjoy, by virtue of this provision of the act, a usufruct in these lands for their rest and recreation which is absolutely inalienable under any law or ordinance; and that any citizen at the present time, or among the generations yet to come, may, by an appeal to a court of chancery, obtain relief by injunction against diverting these lands to any use other than the "recreation, health and benefit of the public," without money and without price. And counsel claims that this usufruct in the people is a perpetuity, the enjoyment of which can never cease.

It is admitted in the answers of the defendants, that the World's Columbian Exposition has enclosed these grounds with a fence, and that they are charging an admission fee to all persons desirous of entering therein, and that it is their intention to absolutely close the same on Sunday. So that if the contention of counsel obtains, the motion to dissolve this injunction should be denied.

In support of the position taken by counsel, he has cited numerous authorities to this court. In view of the gravity of the question raised, and of the important consequences which may result by way of precedent, in case this court should determine that the legislature has the right to divert, even for a temporary purpose, the use of a public park for any other purpose than that of a park, the court has felt it to be its duty to consider with the greatest care the position taken by counsel and the authorities he has cited in support thereof.

Such consideration has been given and as the result thereof the court is forced to the conclusion that the position of counsel for the complainant is not supported by the authorities.

In none of the cases cited can there be found a single instance of what counsel has designated "a public dedication."

In each and every case where a court of chancery has intervened to prevent the diversion of lands used by the public for streets, parks, or other purposes, it will be found that the fee to the land so used by the public rested in some private person or corporation, who had dedicated it to public use, by platting the same, or by conveying the same to the public upon certain trusts or conditions.

The case of *The Maywood Company v. The Village of Maywood*, 118 Ill. 61, cited by counsel for the complainant, discloses the following state of facts: The Maywood Company was the owner of certain lands and recorded a plat of the same upon which appeared one block marked "Maywood Park," and issued numerous circulars and pamphlets, for the purpose of selling the lands designated in said plat, in

which assurances were given that the land so marked would be improved and ornamented as a park. The supreme court held that this amounted to a dedication of the land for public use and enjoined the company from afterwards using the block in question for any other than park purposes.

In the case of *Davidson v. Reed, et al.*, 111 Ill. 167, also cited by counsel, the supreme court held that there had been a dedication by a private owner of a tract of land for cemetery purposes; and that in view of such dedication, his heirs or grantees could not afterwards change the purpose for which the said land was dedicated and given for public use.

The same is true of the case of *The City of Jacksonville v. The Jacksonville Railway Company*, 67 Ill. 540. The land had been dedicated to the public for use as a public square by the original proprietors by a plat duly recorded. And the court, in giving its reasons for enjoining the use of the property in question for railway purposes, declared: "The power of the legislature to repeal the charters of municipal corporations cannot be extended to the right to divert property *given* to the public for one use, to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was *donated*."

This clearly indicates that the ground for the intervention of a court of chancery, was that there was a dedication by the original owners of the fee to the public for a specific use.

The case of *The City of Morrison v. Hinkson*, 87 Ill. 587, was a case in which a citizen sought to recover damages at common law for injuries to his property resulting from the running of a public waterworks, by the city, on one of the public streets of the same. It was not disclosed in the record in whom the fee title to the street rested, and the supreme court simply held that a citizen could recover special damages for injuries to his property occasioned by the running of the waterworks. No question of the diversion of the public use of the street was raised.

The case of *Grogan v. The Town of Hayward*, 6 Sawyer,

498, 4 Fed. 161, was also a case of dedication by a private owner to a special public use.

This is also true of the cases cited by counsel, *Carter v. Chicago*, 57 Ill. 283; *Price v. Thompson*, 48 Mo. 361; and *Sheen v. Stothart*, 29 La. Ann. 630, which were all the cases referred to by counsel in which a court of chancery interfered to prevent the diversion of the use of public property to other than public uses, or to a different public use.

The plain distinction between this class of cases and the case at bar, rests in the opinion of this court, in the fact that in the case under consideration, the land acquired by the South Park commissioners was not donated to public use by private owners, clothing it with a special use for the benefit of the public, and retaining the ownership of the fee in the donator or dedicator. The lands held by the South Park commissioners were acquired by them by purchase or condemnation, and paid for by public taxation.

The corporation designated by the legislature holds the lands for the people's use, it is true, and the legislature has declared when creating this corporation, for what purpose the land is to be used; but it does not follow as a matter of law, that because the legislature has declared at one time a special purpose for which the land was to be used, the same legislature, or any subsequent legislature, acting for and on behalf of the people, cannot by law, change the use to which the land may be put.

The declaration by the legislature in the act of 1869, that the land was to be used for park purposes for the "rest and recreation of the people, and free forever," cannot be held in law to be a dedication of the property. The definition of a "dedication" as given by Bouvier, is "an appropriation of land to some public use, made by the owner and accepted for such use by or on behalf of the public."

This implies that there must be a giving by one party and an acceptance by the other. A person or corporation, public or private, cannot in the nature of things give to itself. He

or it may devote their property to certain uses, but we are able to discover no law, or precedent, for the position, that a person or corporation, holding title in fee simple to land, and devoting it to a certain use, cannot at any time change that use of its or his own volition.

However desirable it might be, that public lands devoted to park purposes for the rest and recreation of the people in a great city like Chicago, should be forever sacredly devoted to that purpose, the present law and constitution are not effective for that purpose. This desirable consummation can only be attained, in our opinion, by an amendment to the constitution.

It is the province of a court not to make law, but to expound and interpret it. In the absence of constitutional restriction, the legislature of the state is omnipotent.

Counsel for the complainant has not been able to point out to this court any constitutional provision which limits the power of the legislature to control the use of lands, the fee to which belongs to the people; and in the absence of such constitutional restriction, we are forced to conclude that it has such power. Authorities are abundant in support of this position.

In Vol. VII, Am. & Eng. Ency. of Law, 417, the doctrine is stated in the following language:

“When lands held by a municipality for public use, are not subject to any special trust, the legislature may authorize a municipal corporation to sell and dispose of the same or apply them to uses different from those to which they are devoted, but, in the absence of such authority, the municipality has no implied power to do so. If the title to the lands has been acquired by condemnation proceedings, the legislature may authorize a sale thereof, if the fee is vested in the city, although the title of the city may be deemed to have been impressed with a trust to hold the lands for the uses for which they were condemned. If, however, the lands have been dedicated by private individuals for a public park

or square, the legislature has no authority to authorize any diversion from the use to which they were originally dedicated."

In the case of *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, the city of Brooklyn acquired by the right of *eminent domain*, a certain tract of land for a public park; and the act authorizing the same provided that the title to all the lands should vest *forever in the city*. The city afterwards ordered a conveyance of one lot to the defendant who refused to take the title, alleging that the act of the legislature authorizing the transfer was unconstitutional, and that neither the mayor nor the park commissioners, who held the title for the city, could give a valid title to the fee.

Exactly the same questions were raised as in the case at bar and in passing upon them the court declares: (p. 243.)

"It is to be observed that the act of 1861 vested the lands in the city of Brooklyn *forever, but for the uses and purposes in that act mentioned*. Though the city took the title to the lands by this provision, it took it for the public use as a park, and held it in trust for that purpose. Of course, taking the title, had it taken it also free from such trust, it could have sold and conveyed it away, when and as it chose. Receiving the title in trust for an especial public use, it could not convey without the sanction of the legislature; and the act of 1870 expresses the legislative sanction. Under its provisions (Laws of 1870, ch. 373, p. 848), it is authorized to sell and convey, with covenants, certain portions of the lands taken (§ 1), of which the premises in question in this case are a part. *It was within the power of the legislature to relieve the city from the trust to hold it for a use only, and to authorize it to sell and convey.* * * *

Where the property is taken, the owner paid its true value, and the title vested in the public, it owns the whole property, and not merely the use; and, though the particular use may be abandoned, the right to the property remains. The property is still held in trust for the public by the authorities.

By legislative sanction it may be sold, be changed in its character from realty to personalty, and the avails be devoted to general or special public purposes."

In the case of *Clark v. City of Providence*, 16 R. I. 337, 15 Atl. 763, it was held that the general assembly of Rhode Island had the power as against the public to authorize the discontinuance of a public park, the fee of which is in the city, and the sale of the park lands.

In the case of *Mowery v. City of Providence*, 16 R. I. 422, 16 Atl. 511, it was held that a court of chancery had no power to enjoin a city from discontinuing a park and selling the land under an act of the legislature, unless the act conferring the authority was unconstitutional.

In the case of the *Chicago, Rock Island and Pacific Railroad Company v. City of Joliet*, 79 Ill. 25, the supreme court of this state held (p. 33) that where property was dedicated by the owner thereof, as public ground generally, it was an unrestricted dedication to public use, and that the legislature, under such a dedication, had the right to authorize the change of the use by the public from that of a court house yard to railway purposes.

Dillon, in his admirable work on municipal corporations, (4th ed.), sec. 651, lays down the law upon this subject in the following terms:

"As between the municipality and the general public, the legislative power is, in the absence of special constitutional restriction, supreme,—and so it is in all cases where there are no private rights involved. If the municipal corporation holds the full title to the ground for public uses, without restriction, the legislature may doubtless direct and regulate the purposes for which the public may use it. But if a grant be made by a proprietor of a town in laying it out for a specific and limited purpose, as, for example, a 'public square,' the municipality or public acquiring it upon a trust for the uses and purposes set forth on the plat or in the conveyance, it has been decided by the supreme court of Iowa that the grantor in such a case retains an interest there-

in of such a nature that it is not, as against him, within the power of the legislature to authorize its sale by the municipality. * * *

And in the following section, Dillon lays down the general rule in the following language:

"That while the general rule is that the legislative dominion over the uses of public property is plenary, it is also true, as is more fully shown elsewhere, that there may be rights in the dedicator or in the abutting owner of such a nature,—that is, property rights and rights resting upon contract,—that they cannot be destroyed, and of which he can only be deprived by the exercise of the right of *eminent domain*. * * *

In the case of *City of Newark v. Stockton*, 44 N. J. Eq. 179, the court, (p. 186) in passing upon the question as to whether or not the city of Newark had a right to divert the use of a certain tract of land, acquired by its inhabitants for burial purposes, declares:

"The general principle of law on the subject is, that municipal property is subject to legislative authority. When property is put in trust in the hands of such a corporation the effect is to prevent the corporation from perverting, at its own will, such property to other uses; but when the uses are public, and not derived from private grant, they are liable to be modified or changed, with the concurrence of the law-making power. No case has been found that conflicts with this rule."

Our own supreme court, in the case of *People v. Walsh*, 96 Ill. 232, has recognized the right of the legislature to control and change the uses of property, the fee of which is held by or for the public. In that case the right of the South Park commissioners to change the use of one of the streets of the city of Chicago to a boulevard, was called into question by *quo warranto*; and in passing upon the question the court says: (p. 248.)

"The *fee* of the streets here, is, on both sides, stated to be in the city. That is to say, the city, as the agent or repre-

sentative of the public, holds the fee for the use of the public,—not the citizens of the city alone, but the entire public, of which the legislature is the representative.” Citing *Chicago v. Rumsey*, 87 Ill. 355.

And on page 250, the court continuing says, that “The legislature represents the public. So far as concerns the public, it may authorize one use today and another and different use tomorrow. If the new use affects private rights, proceedings for condemnation may have to be invoked, but so far as it affects the public alone, its representative, in the absence of constitutional restraint, may do as it pleases.”

It would seem needless to refer to other authorities of the same import. Indeed the doctrine is recognized in some of the cases cited by counsel for complainant.

In the case of *Price v. Thompson*, 48 Mo. 361, 364, 365, cited by him, the court says: “The park (referring to the land in controversy) was public property, and whether they (the town authorities) could divert it from its original use and the purpose specified by the donor in the act of dedication, is the question. *The property did not inure, nor was it acquired by the exercise of the right of eminent domain.* There is no act of the legislature directing what use shall be made of the corporate property. * * *”

In the case of *People v. Mayor*, 51 Ill. 17, 31, also cited by counsel for the complainant, the supreme court says:

“It is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have, in their franchises, no vested right, and whose powers and privileges the creating power may alter, modify or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the state, over which, and their rights and effects the state may exercise a general superintendence and control. * * *”

That the South Park commissioners is such a municipal corporation has been expressly held by our supreme court in numerous cases, beginning with the case of *People v. Salo-*

mon, 51 Ill. 37, and ending with the *West Chicago Park Commissioners v. McMullen*, 134 Ill. 170.

The conclusion, therefore, seems irresistible. That the legislature of the state of Illinois, in the absence of constitutional restraint, (and none appears) has plenary power to declare, by legislative enactment, to what use the lands in question should be put. In pursuance of that power it has enacted two laws bearing upon the subject:

First: The act of February 24th, 1869, (1 Priv. Laws of Ill. 1869, p. 358) in which it declares in section four (4), that the lands in question "shall be held, managed and controlled by them and their successors as a public park, for the recreation, health and benefit of the public, and free to all persons forever, subject to such necessary rules and regulations as shall from time to time be adopted by said commissioners and their successors, for the well ordering and government of the same."

But by section thirteen (13) of the same act, they also authorize the said board "to have the full and exclusive power to govern, manage and direct said park; * * * and generally, in regard to said park, they shall possess all the power and authority now by law conferred upon or possessed by the common council of the city of Chicago, in respect to the public squares and places in said city. * * *"

The charter of the city of Chicago, then in force, authorized the city of Chicago to take and hold, purchase, lease and convey such real, personal or mixed estate as the purposes of the corporation may require, within or without the limits aforesaid.

Section one (1) charter of the city of Chicago, approved February 13, 1863, Gary's edition of laws and ordinances of the city of Chicago, 1866.

It would thus appear that in the very act which created the South Park commissioners a corporation, power was given to these commissioners to lease the land in question.

But even if this were not sufficient to authorize the South Park commissioners to pass an ordinance, under the terms

of which they might turn over *Jackson Park* and the *Midway Plaisance* to the *World's Columbian Exposition*, the defendants do not in this case rest the right so to do upon that act. They set up specially in their answers, the act of August 5th, 1890, in and by which (section 3) they are specifically authorized to allow the use of the same, or any part thereof, for the purposes of the *World's Columbian Exposition*, upon such terms and conditions as may be agreed upon between said South Park commissioners and the authorities having the management of said exposition. And by virtue of this said authority in the act of 1890, the South Park commissioners have, by ordinance, turned over the grounds in question to the *World's Columbian Exposition*, giving them full and absolute power to take exclusive possession of the same from the first day of October, 1892, until the first day of January, 1894.

By virtue of these acts and of that ordinance, the court is of the opinion that the *World's Columbian Exposition* is in lawful possession of the property, and had, under the ordinance in question, the right to enclose the property during that period and if it had the right to enclose it, it has the right to charge an admission fee on any days upon which it may be open; and has also the right to foreclose it upon the first, the last, or any other day of the week, during the period mentioned.

This right it need not rest upon the police power, and it does not invoke the same. In the exercise of their judgment as business men controlling a stupendous business undertaking, and acting under the authority conferred upon them by the legislature, and the ordinance of the South Park commissioners, the directors of the *World's Columbian Exposition* have deemed it for the best interests of the corporation, that it be closed upon Sundays; and in the exercise of that discretion, we are of the opinion, that a court of chancery has no right to interfere.

This court is unanimously of the opinion that there is no religious question involved in this case; and that in the exer-

cise of their sound discretion as business men, in ordering the gates closed on Sunday, the directors of that company have not and do not discriminate between any classes of religious people. Whether we are or are not a Christian nation is not the question in issue in this case.

If they had decided to keep the gates of the exposition grounds open every day of the week, it would have been their right so to do; and in that event there would have been no more ground for the interference of a court of chancery than there is at the present time.

We are, therefore, of the opinion, that the injunction in this case should be dissolved, and are of the opinion that if the issues presented to this court en banc and heretofore discussed by us had been submitted to the able and learned chancellor who issued the temporary injunction herein, he would not have granted the same.

The motion to dissolve the injunction in this cause is sustained.

Judge Goggin in his dissenting opinion said:

The principal question presented in this case is whether the World's Columbian Exposition by virtue of its agreement with the South Park Commissioners obtained lawful control over the park grounds and acquired the power to enclose the same with a fence and exclude the public therefrom on the first day of the week commonly called Sunday. It is claimed by the defendants that the South Park Commissioners have the right to confer such control and power for two reasons: First, because they were authorized so to do by section 3 of the act of August 5, 1890, and second, because of the general powers conferred upon them by the act of February 24, 1869. It is plain, however, that the position assumed by the defendants is not tenable.

First. Section 3 of the act of August 5, 1890 is as follows:

"Sec. 3. In case the site or sites for the holding of the said World's Columbian Exposition, as finally located and fixed by the authorities in charge thereof, shall include the

whole or any part of any public park which is or may be under the control and management of park commissioners, then and in that event it shall be competent and express authority for that purpose is hereby granted to the park commissioners having the control and management of such public park to allow the use of the same or any part thereof for the purposes of said World's Columbian Exposition upon such terms and conditions as may be agreed upon between the said park commissioners and the authorities having the management of said exposition."

It cannot be doubted that, if this statute is valid, its terms are broad enough to confer the right thus claimed. But it is very plain that the act referred to, so far as the section quoted is concerned, is invalid.

Section 22 of Article 4 of the Constitution of 1870, provides that the General Assembly shall not pass local or special laws in any of certain enumerated cases, among which is a local or special law for "granting to any corporation, association, or individual, any special or exclusive privilege, immunity or franchise whatever."

By reference to the act in question it will be observed that it does not purport to authorize the park commissioners to allow the use of park property to exposition companies or associations generally. The sole power given is to allow the use of park property to the authorities of the World's Columbian Exposition, a particular corporation or association. That the right to take possession of and use park property for the purpose of conducting an exposition or any other enterprise of a private corporation is a "privilege" within the meaning of the constitution is too plain to admit of dispute. The act in question is, therefore, plainly one granting to a particular corporation or association a special privilege not granted to other corporations or associations, and unconstitutional.

This position is not rendered any the less tenable by the fact that the act in question does not directly grant to the exposition authorities the privilege of taking possession of and using park property, but simply authorized the park

commissioners to grant the privilege. The right given by the act to the exposition authorities to obtain by contract the right to use park property and to reap the benefits of such contract would itself be a "privilege" within the meaning of the constitution. Apart from this, it is evident that what the constitution forbids the Legislature to do directly, it cannot be permitted to accomplish by indirection. Being forbidden to itself confer by special law a special privilege upon any corporation, association or individual, it cannot defeat the purpose of the constitution by authorizing its agents to confer that privilege.

But even were the act in question not in contravention of the constitutional provision above referred to, it would still be invalid for another reason. While it may be true, as a general rule, that the legislature has such power over municipal corporations that it may direct land purchased for park purposes to be diverted to other uses, yet that power can only be lawfully exercised in accordance with the limitations imposed upon the legislature by the constitution. Upon consideration of the various provisions of the constitution, it will be found that it contains no warrant for an act of the legislature which purports to authorize a municipal corporation to surrender control of park lands to a private corporation for the purpose of carrying on a private business or enterprise.

That the legislature has no power under the constitution to grant to corporate authorities the right of taxation for any other than corporate purposes is well settled: Constitution of 1848, sec. 5, Art. 9; Constitution of 1870, secs. 1, 9 and 10, Art. 9; *Harvard v. St. Clair, etc., Drainage Co.*, 51 Ill. 130; *Board of Trustees of Schools, etc., v. People ex rel. Toledo, etc. Ry. Co.*, 63 Ill. 229; *Sleight v. The People, etc., for use of Weller Township*, 74 Ill. 47; *People ex rel. Cairo & St. Louis Ry. Co. v. Dupuyt*, 71 Ill. 651; *People ex rel. Cairo & St. Louis R. R. Co. v. Trustees of Schools*, 78 Ill. 136; *Board of Supervisors of Livingston Co. v. Weider*, 64 Ill. 427.

It is plain, therefore, that if the legislature had authorized

the South Park Commissioners to levy taxes for the purpose of purchasing land and had declared that the land thus purchased should be turned over to the World's Columbian Exposition authorities to be used in the manner in and for the purpose for which it is now being used, no one would have the hardihood to contend that such an act of the legislature would have any validity. Taxation by any municipal corporation for the purpose of raising money to aid a private corporation in carrying on a show or exhibition to which the public are admitted only upon paying an admission fee, which fee is to belong to such corporation, is clearly taxation for a purpose not corporate. *Livingston Co. v. Weider*, 64 Ill. 427; *People v. Dupuyt*, 71 Ill. 651; *People v. Trustees*, 78 Ill. 136.

In *People v. Trustees*, 78 Ill. 136, the question arose whether the legislature could, under the Constitution of 1848, authorize the trustees of schools of a township to subscribe for the capital stock of a railroad company and levy taxes to pay for the same. The court in deciding the case said:

"It is urged by appellees, that Art. IX, Sec. 5, of that Constitution, prohibited the general assembly from conferring that power on such a body; that the creation of such a debt, and the levy of such a tax, is not for a corporate purpose. That section provides that 'the corporate authorities of counties, townships, school districts, cities, towns and villages may be invested with power to assess and collect taxes for corporate purposes.' This clause was manifestly intended to limit the legislative power in conferring authority on corporate bodies as assess and collect taxes."

Without any provision in the constitution on the subject, the general assembly have the power to impose taxes as they may choose. They could impose a tax on one species of property, and exempt another. They could fix the mode of ascertaining and the manner of its imposition as they might choose, if the power was not limited, and the mode prescribed in the fundamental law. This was, then, most clearly a limitation of legislative power.

Had this restriction not been imposed, the general assem-

bly could have empowered any of these quasi corporations or municipalities to levy and collect taxes for any purpose, whether germane to the object of its organization, or for other purposes. They could have authorized a school district to levy and collect a tax to build a court house, a jail, bridge, or other county object; or a school township or district to erect a poor house and maintain the paupers of the county.

These school townships were created and are continued for school purposes alone, and not for municipal purposes. They are only intended to establish schools, and loan and manage the school fund of the township, and pay the teachers of schools taught in their jurisdiction. This is the purpose of their organization. They were not created to exercise any of the functions of government, and hence are not municipal in their nature or purpose, nor are they provided with the officers or the power to exercise the functions of government. Cities, towns and villages are endowed with such powers and are created and maintained for their exercise. Their very object is to aid in the government of the people. And such is true, in a more limited sense, of counties. But none of these functions are conferred upon school townships or districts, but their creation is purely to aid in the great scheme of accomplishing universal education.

The body of men who framed the constitution must be supposed to have known the meaning of the language employed, and they must have believed that it would be understood in its ordinary sense, and they must have supposed it would receive a reasonable interpretation and a practical application in the administration of government. When, therefore, they used the language 'for corporate purposes,' they supposed that, if any question arose in the construction of this clause, the legislative, executive or judicial department of the state, which was required to apply its principles, would look and see what was the object of the creation of the body, and limit it to that purpose. They did not, on the one hand, expect that there would be an effort to push the construction to the extent that it would embrace all purposes which might, by possibility, be

brought in the corporate power. Nor yet, on the other hand, to so contract and narrow the construction as to exclude purposes that are embraced in their charters, but which may not be strictly germane to corporations of that character; but that it would be held to authorize the exercise of the power, when the body is created for specified public purposes, although of a mixed character; as, if these school townships had been empowered, in addition to the duties imposed upon them, to locate, open and maintain roads in the limits of their territory, then they could have been empowered to levy a tax for the maintenance of roads, as that would have been a corporate purpose.

But school townships are not invested with such powers over roads, and hence they cannot be invested with authority to assess and collect a road tax, nor can they be until one of the purposes of its existence shall be to repair the roads in the township. To give any other construction would be to abrogate and wholly disregard this provision. To say that because the general assembly confers the power to levy a tax for any purpose, the law of the organization for such body is thereby changed, and the tax is for a corporate purpose, would be to render this restriction wholly nugatory. We fail to comprehend the force of such reasoning, and we must give some effect to this constitutional provision. Although that constitution has ceased to be a rule for the guidance of the departments of government, still all laws adopted whilst in force, and all rights acquired under it, must be tried by and enforced as though it was in full vigor.

Had the construction contended for by appellant been what was intended, why not have simply said that these bodies might be invested with power to 'assess and collect taxes?' Or why insert any provision on the subject and let the power of the general assembly remain unrestricted? That strikes us as the more natural and reasonable course that would have been pursued. Tested by these rules, the subscription by a school township or school district for the stock in a railroad company or the levy of a tax to raise the money to

pay for the same, cannot be held to be a corporate purpose. Such a tax in nowise aids or promotes education, for which such bodies are created. And this is the construction given to this clause in the cases of *Trustees of Schools, etc., v. Toledo, Wabash and Western Railway Company*, 63 Ill, 299, and *People ex rel. v. Dupuyt*, 71 Ill. 651, when the same question was before the court as is presented by this record."

In view of what is thus said by the court in the case cited, it is plain there can be no sound foundation for the contention that the holding of an exposition or other exhibition under the control of a private corporation involving the fencing up of park property and the exclusion of the public therefrom, excepting upon the payment of an admission fee, is a "corporate" purpose of park commissioners such as the South Park Commissioners, who are organized as a corporation for the purpose of acquiring lands to be "held, managed and controlled by them and their successors as a public park, for the recreation, health and benefit of the public, and free to all persons forever." It is, on the contrary, a purpose in direct conflict with the object for which the corporation known as the South Park Commissioners was brought into being. Hence a legislative act authorizing a tax to be levied for the benefit of such an exposition or exhibition would be unconstitutional and void.

If, then, the legislature has no power to authorize park commissioners to levy taxes for the purpose of purchasing property to be donated or turned over to a private corporation to be used by it for a purpose not corporate, it follows necessarily that it cannot direct that land already purchased by money raised by taxation for corporate purposes shall be thus donated or turned over. To permit such a power to be exercised would allow that to be done indirectly which cannot be done directly.

It is manifest, therefore, that the inhibition of the constitution against acts of the legislature purporting to confer upon municipal corporations the power to levy taxes for purposes not corporate, carries with it necessarily a like inhibition

against any legislative act permitting money or property obtained from the people by taxation to be diverted to a purpose not corporate.

The act referred to for both the reasons suggested is, therefore, unconstitutional and void.

Second. The act of February 24, 1869, declares that the park lands, "shall be held, managed and controlled by them (i. e., the park commissioners) and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever, subject to such necessary rules and regulations as shall, from time to time, be accepted by said commissioners and their successors for the well ordering and government of the same;" and it further provides that they shall "have full and exclusive power to govern, manage and direct said park * * * and, generally, in regard to said park they shall possess all the power and authority now by the law conferred upon or possessed by the common council of the city of Chicago in respect to public squares and places in said city." As the charter of the city of Chicago then in force authorized it to take hold, purchase, lease and convey such real estate as the purposes of the corporation may require, it is claimed, as a sequence, that the park commissioners had the power to lease the park land to the authorities of the World's Columbian Exposition.

If the park commissioners had purchased land for park or other corporate purposes which they could use for such lawful purpose and at the same time increase their revenues by such partial leasing of the same as would not interfere with its use for the corporate purpose for which it was intended, it is probable that such partial leasing might be tolerated, upon the same principle that a corporation having had power to hold so much real estate as may be necessary for the transaction of its business, and becoming the owner of a larger building than it needs, may lawfully lease the portion thereof which it does not need.

But such is not this case. Here the land turned over to the exposition authorities was not land not needed by the park commissioners for the corporate purposes, but land included

in a park which, at the time it was thus turned over, was in use as such and open to the public. Its turning over, furthermore, involved to a large extent, the destruction of its trees and other ornaments which enhanced its usefulness as a public park "for the recreation, health and benefit of the public."

Again, so much of the act last referred to as purports to confer upon the park commissioners "all the power and authority now by the law conferred upon or possessed by the common council of the city of Chicago in respect to public squares and places in said city," must be so construed as to be consistent with the other parts of the act. To lease a public park to a private corporation is manifestly inconsistent with its being "held, managed and controlled * * * as a public park for the recreation, health and benefit of the public and free to all persons forever." The power and authority to be exercised by the park commissioners, therefore, is such power and authority as is consistent with the holding and managing of the property "as a public park for the recreation, health and benefit of the public and free to all persons forever." It is a self-evident proposition that property cannot be "held, managed and controlled * * * as a public park for the recreation, health and benefit of the public and free to all persons forever," and at the same time be leased to a private corporation with power to exclude the public therefrom.

Apart from this it is clear that even the city council of the city of Chicago would have no power, by a lease or otherwise, to divert a public square or other place to a use that was not corporate. The evident meaning of the legislature, by giving park commissioners "all the power and authority now by law conferred upon or possessed by the common council of the city of Chicago in respect to public squares and places in said city," was not to give them power to lease such property to private individuals for noncorporate purposes, but simply to authorize them to exercise the same general power, supervision and control as is generally exercised by the corporate authorities of cities over similar property.

Finally, what is above said, with respect to the act of

August 5, 1890, is in part equally applicable to the attempt to construe the law of February 24, 1869, as giving the park commissioners power to lease the park lands to the exposition authorities. The park commissioners, having no power to levy taxes for other than corporate purposes, are not authorized, after having levied taxes and purchased property with the money collected, to divert that property to a non-corporate purpose and thus do indirectly what the constitution forbids to be done directly.

I am, therefore, clearly of the opinion that the action of the South Park Commissioners in turning the park lands over to the authorities of the World's Columbian Exposition was without sanction of law and that it was flagrant disregard of the constitution of this state. Being of that opinion I cannot permit myself to enter an order in this case giving to such action judicial sanction.

The point is made that this suit can not be maintained in the name of the complainant, but that only the attorney-general can maintain such a bill. I do not regard the authorities cited by counsel for defendants as sustaining their position. However this may be, in the absence of a decision of the supreme court of this state directly in point, I am not willing to lay down a rule by which the success of a private corporation in seizing upon and holding a public park and excluding the public therefrom will be made to depend solely upon the whim, caprice, dishonesty or ignorance of the individual who may for the time being happen to fill the office of attorney-general. But this suit though not instituted in the name of the attorney-general, has his express sanction, and this I regard as, in any event, sufficient.

The complainant, therefore, would, in my opinion be entitled to an injunction restraining the authorities of the World's Columbian Exposition from excluding him from the park land on any day or from demanding from him the payment of an admission fee at any time. All he has asked, however, is, in effect, that the exposition authorities be enjoined from excluding the public from the park grounds on Sunday,

and that is all the court granted. The fact that he asks for less than he is entitled to can not be successfully urged by the defendants as a reason for refusing him any relief at all. It would be an unheard of proceeding to deny a complainant any relief, because his rights were more extensive than those which he chose to assert.

The motion to dissolve the injunction must, therefore, be denied.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

Gustave Myers.

(July 11, 1908.)

1. **PERJURY—INDICTMENT—ALLEGING SUBSTANCE OF FALSE TESTIMONY.** In an indictment for perjury it is insufficient to set out the *substance* of the alleged false testimony.
2. **INDICTMENT—CERTAINTY OF.** In criminal pleading the highest degree of certainty is always required.
3. **PERJURY—INDICTMENT BASED ON FALSE STATEMENT OF WITNESS TO EFFECT THAT HE DID NOT REMEMBER.** An indictment for perjury can be predicated upon the false statement of a witness that he did not remember a certain fact. The difficulty lies only in the making of the proof.
4. **SAME—SUFFICIENCY OF INDICTMENT AS TO MATERIALITY OF TESTIMONY.** An indictment for perjury must allege that the alleged false testimony was material to the issue or point in question. It is insufficient to merely allege that it was material.
5. **SAME—MATERIALITY OF TESTIMONY AS TO EFFECT PRODUCED BY LIBEL.** A witness may testify as to the impression produced upon him by a libel and such testimony is material.
6. **SAME—MATERIALITY OF IMPROPER CROSS EXAMINATION.** Where a witness is cross-examined with respect to matters not germane to the direct testimony, perjury cannot be assigned on such cross examination.

Motion to quash indictment for perjury. No. 87,430.

STATEMENT OF FACTS.

The defendant was indicted for perjury, alleged to have been committed in a libel suit. The indictment consisted of three counts. Count I alleged:

That heretofore, to-wit, on the second day of March, in the year of our Lord, one thousand nine hundred and eight, at Chicago * * * in the municipal court of Chicago, in the said county of Cook, the Honorable William N. Cottrell, judge of said municipal court of Chicago, presiding in a certain judicial proceeding, to-wit, a certain issue between one Robert D. Lay and Gustave Myers, late of * * * in a certain plea of trespass on the case, wherein the said Robert D. Lay was plaintiff and the said Gustave Myers was defendant, to-wit, a certain suit for alleged damages to the amount of \$1,000 and no more, resulting from the alleged composition and publication by the said Gustave Myers of and concerning the said Robert D. Lay, in a certain printed pamphlet, which said pamphlet was then and there introduced and received in evidence as an exhibit, to-wit, plaintiff's Exhibit B, on the trial of said cause, on behalf of the said Robert D. Lay, a certain alleged false, scandalous, malicious and defamatory libel, came on to be tried in due form of law, and was then and there in the city of Chicago in the county of Cook aforesaid duly tried before the said William N. Cottrell, judge of said municipal court of Chicago so presiding as foresaid, upon which said trial the said Gustave Myers then and there appeared as a witness for and on his own behalf, to-wit, on behalf of the said Gustave Myers, defendant in the plea aforesaid, and was then and there duly sworn in due form of law by Harry S. Holmberg, deputy clerk of the said municipal court of Chicago, that the evidence which he, the said Gustave Myers should give to the court there touching the matters then in question between the said parties, should be the truth, the whole truth and nothing but the truth, he, the said Harry S. Holmberg, deputy clerk as aforesaid, then and there had full power and authority to administer said oath to the said Gustave Myers in that behalf, and the said

municipal court of Chicago so presided over by the said William N. Cottrell, judge as aforesaid, then and there had jurisdiction to the amount of \$1,000 of the parties to and the subject-matter of said cause to the amount of \$1,000.

And the jurors first aforesaid, upon their oaths further present that at and upon the trial of said issue so joined between the said parties as aforesaid, it then and there became and was a material question whether he, the said Gustave Myers, was the author of said alleged libel contained in said pamphlet introduced and received in evidence on behalf of the plaintiff in said cause as plaintiff's Exhibit B, as aforesaid; and whether or not he, the said Gustave Myers, had at any time theretofore received copies of said alleged libel.

And the jurors first aforesaid, upon their oaths aforesaid, do further present, that the said Gustave Myers, being so sworn as aforesaid, not regarding the laws of this state, but contriving and intending to prevent the due course of law and justice, and unjustly to aggrieve the said Robert D. Lay, the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him then and there on the trial of said issue to sundry heavy costs and expenses, upon his oath aforesaid, falsely, feloniously, corruptly, wilfully, knowingly and maliciously, before the said William N. Cottrell, judge as aforesaid, did then and there, to-wit, on the 5th day of March, in the year of our Lord, one thousand nine hundred and eight, depose and swear, among other things, in substance as follows:

"I am not the author of that paragraph" (meaning and intending thereby to say that he, the said Gustave Myers, was not the author of said alleged libel contained in said pamphlet introduced and received in evidence on the trial of said cause as plaintiff's Exhibit B, as aforesaid). "I never have received the copies that you speak of. I never have received them" (meaning and intending thereby to say that he, the said Gustave Myers, had never at any time theretofore received any printed, written or other copies of said alleged libel contained in said pamphlet introduced and re-

ceived in evidence on the trial of said cause as plaintiff's Exhibit B, as aforesaid), which testimony was false, etc.

Count II alleged that the defendant deposed "in substance" that he "did not remember where he * * * had first seen the said pamphlet introduced and received in evidence on the trial of said cause as plaintiff's Exhibit B, as aforesaid; * * * that he, * * * did not then and there remember whether or not he, * * * had caused said alleged libel contained in said pamphlet introduced and received in evidence on the trial of said cause as plaintiff's Exhibit B, as aforesaid, to be printed by the Hill Printing Company in Toledo, Ohio, in the month of October, in the year of our Lord, one thousand nine hundred and seven; * * * that he, * * * did not then and there remember how many times he, * * * had before then met one John N. Hill, the person who had printed or caused to be printed said alleged libel contained in said pamphlet introduced and received in evidence in said cause as plaintiff's Exhibit B, as aforesaid; * * * that he, * * * did not then and there remember whether or not he, * * * had met said John N. Hill in Toledo, Ohio; * * * that he * * * did not then and there remember whether or not he * * * had delivered to said John N. Hill at his place of business in the city of Toledo in October, in the year of our Lord, one thousand nine hundred and seven, or at any other time, a manuscript of said alleged libel contained in said pamphlet introduced and received in evidence on the trial of said cause, as plaintiff's Exhibit B, as aforesaid, or which contained in substance the same alleged libel aforesaid; * * * that he * * * did not then and there remember whether or not he, * * * had paid to John N. Hill any money for printing the said alleged libel contained in said pamphlet introduced and received in evidence as plaintiff's Exhibit B, as aforesaid; * * * that he, * * * did not then and there remember whether or not he, * * * had ever before then seen a certain printer's proof of said printed pamphlet containing said alleged libel, which said

printer's proof had on the trial of said cause been introduced and received in evidence on the part of the said plaintiff as an exhibit, to-wit, plaintiff's Exhibit E; * * * that he * * * did not then and there remember whether or not he * * * had seen said printer's proof introduced and received in evidence on the trial of said cause as plaintiff's Exhibit E, as aforesaid, in the place of business of the said Hill Printing Company, in October, in the year of our Lord, one thousand nine hundred and seven, in the city of Toledo, Ohio; * * * that he * * * then and there could not say whether or not certain writings, to-wit, the words 'recognize the district of Columbia,' then and there appearing upon said printer's proof, to-wit, said Exhibit E, were in the handwriting of him, the said Gustave Myers," which testimony was false, etc.

Count III alleged that in a certain action at law the said defendant "was charged by the said Robert D. Lay, in substance, with having theretofore maliciously written, published and circulated a certain alleged libelous statement of and concerning the said Robert D. Lay in a certain printed pamphlet entitled 'The Crime of a Life Insurance Company,' and which said alleged libelous statement was and is in words and figures as follows, to-wit: 'Robert D. Lay, the secretary of the company, is a young man and is said to be a relative of Mr. E. A. Shedd, one of the principal owners of this company. According to the National Life's sworn statement to the insurance department of the state of Minnesota, Mr. Lay's salary is given as \$4,000 per annum. Still, it is reported that when asked by a friend a short time ago what his salary was, he replied that he was making \$12,000 a year OUT OF IT; ' and in and by which alleged libelous statement the said Robert D. Lay in said cause further alleged and contended, in substance, that the said Gustave Myers falsely and maliciously intended and meant to and did state and charge that the said Robert D. Lay had theretofore stated and admitted, and that the fact was, that he, the said Robert D. Lay, had surreptitiously and unlawfully, while

acting as the secretary of a certain life insurance company, to-wit, the National Life Insurance Company of the United States of America, appropriated from the funds of said company \$8,000 in excess of his salary per annum."

That the said defendant was called as a witness in his own behalf and testified as follows:

"Q. Are you acquainted with A. M. Andrews?

"A. Yes, sir.

"Q. How long have you known him?

"A. Three years.

"Q. I will ask you to state whether at any time Andrews had a conversation with you in which the salary, earnings or income of Robert D. Lay, the secretary of the National Life Insurance Company, was under discussion? Answer yes or no.

"A. Yes.

"Q. When was that, about?

"A. It was shortly after I resigned from the National Life.

"Q. We don't know when you resigned from the National Life; tell us about the month.

"A. It must have been either the latter part of 1906 or the early part of 1907.

"Q. The latter part of 1906 or the early part of 1907?

"A. I think so, yes, sir.

"Q. That is as close as you can fix the time?

"A. For the present.

"Q. Where did this conversation take place?

"A. At his office.

"Q. Where was his office?

"A. In the Woman's Temple building.

"Q. Who were present at this meeting?

"A. Just he and me.

"Q. You and him?

"A. Yes, sir.

"Q. Now, what, if anything, did Andrews say to you, in regard to the salary of Robert D. Lay?

"A. He said, 'Gus, what is Lay's salary?' and I told him that I understood it to be \$4,000 a year.

"Q. Well, what did he say? Go on.

"A. I can't state what he said.

"Q. Well, if you can't state, then step off; don't you know?

"A. Well, excepting it is vile what he said in connection with the exact statement.

"Q. Will you please say what he said, or say that you don't want to say it, or do whatever you please about it?

"A. Why, he said, he told me 'I asked him some time ago what he was getting and he told me he was making \$12,000 a year out of it.'

"Q. Is that all the conversation that you remember?

"A. No.

"Q. Well, tell us something more; go on.

"A. He said to me 'Myers was usually serious,'—will you please read the question again?

"Q. Tell us what he said to you in regard to Lay's salary. Have you stated it all?

"A. Yes, as far as the salary is concerned, about all, yes.

"Q. Very well; that is all I wanted to know. Mr. Myers, I will ask you to look at the passage in the pamphlet marked Plaintiff's Exhibit B, at the bottom of page 21. Have you seen it before?

"A. Yes.

"Q. Did you read it?

"A. Yes.

"Q. State to the court what impression the reading of it made upon you as to whether it was intended to charge Robert D. Lay with surreptitiously and unlawfully appropriating from the funds of the company \$8,000 in excess of his salary?

"A. It made no such impression.

"Q. State whether or not, in your opinion, the language is or is not compatible with perfect honesty on the part of Lay.

"A. Yes.

"Q. Have you read the whole of the pamphlet?

"A. Yes."

That on cross-examination the defendant testified that he "did not then and there remember where he had first seen the said pamphlet containing the alleged libelous paragraph aforesaid, and the said Gustave Myers, having taken said lawful oath as aforesaid, did further unlawfully, wilfully, corruptly, falsely, knowingly and feloniously then and there depose, swear and testify in substance, among other things, that he, the said Gustave Myers, did not then and there remember whether or not he had caused the alleged libelous paragraph aforesaid to be printed, and that he did not then and there remember whether or not he had caused the alleged libelous paragraph to be printed by the Hill Printing Company in Toledo, Ohio, in the month of October, in the year of our Lord one thousand nine hundred and seven; * * * that he * * * had never received any copies of said printed paragraph aforesaid; * * * that he * * * did not then and there remember when and where or how many times he had then before met one John N. Hill, who had then before, to-wit, in October, in the year of our Lord one thousand nine hundred and seven, printed said alleged libelous paragraph, and that he did not then and there know whether or not he * * * had met the said John N. Hill in Toledo, Ohio; * * * that he * * * did not then and there remember whether or not he had delivered to John N. Hill, at the place of business of the said John N. Hill in Toledo, in October, in the year of our Lord, one thousand nine hundred and seven, or at any other time, a manuscript of the particular paragraph that he * * * had theretofore in his direct examination as aforesaid interpreted; * * * that he did not then and there remember whether or not he had paid to the said John N. Hill any money for printing the particular paragraph that he * * * had in his direct examination aforesaid interpreted; * * * that he * * * had not, to his recollection, ever before seen and that he did not then and there remember whether or not he had seen in the city of Toledo, Ohio, in the place of business of the Hill Printing Company, in October, in the year

of our Lord, one thousand nine hundred and seven, a certain printer's proof of the said printed pamphlet containing the said alleged libelous paragraph as aforesaid, which printer's proof had in the trial of said cause been introduced in evidence by the plaintiff, and then and there marked Exhibit E, and which said Exhibited E was then and there exhibited to the said Gustave Myers; * * * that he * * * did not then and there think he could say whether or not certain written words appearing upon said printer's proof, Exhibit E aforesaid, were in his handwriting; that he, * * * could not then and there say whether or not the words 'recognize the District of Columbia,' appearing upon said exhibit, were in his own handwriting; that he * * * could not then and there say whether or not the words 'in the form of dividends,' appearing upon said printer's proof, Exhibit E as aforesaid, were in his own handwriting; that he * * * did not then and there know in whose handwriting the words 'look for lead line,' appearing upon said printer's proof, Exhibit E as aforesaid, were;" which testimony was false, etc.

A motion to quash the indictment was made and argued before Judge Thomas G. Windes.

John J. Healy, state's attorney, for the People.

Benjamin D. Magruder, George King, Harry Fisher and John F. Geeting, for defendants.

POINTS FOR DEFENDANT.

I.

¶The indictment does not show that the municipal court had jurisdiction over the subject-matter of the libel suit. *Kizer v. People*, 211 Ill. 407; *Maynard v. People*, 135 Ill. 425; 2 Bishop's New Criminal Procedure (4th ed.), sec. 910a; *Pankey v. People*, 2 Ill. 80; 22 Ency. of Law (2d ed.) p. 683; *Johnson v. State*, 58 Ga. 397; *United States v. Jackson*, 20 D. C. 424; *Renew v. State*, 4 S. E. 19; *Elkin v. People*, 28 N. Y. 177; *Franklin v. State*, 91 Ga. 712; *State v. Furlong*,

26 Me. 69; *State v. Plummer*, 50 Me. 217; *People v. Howard*, 111 Cal. 655; *United States v. Wilcox*, Fed. Cas. 16,692; *State v. Jenkins*, 1 S. E. 437.

II.

It is insufficient to set out the alleged false testimony in substance only. *Wilkinson v. People*, 226 Ill. 135; *Coppack v. State*, 36 Ind. 513; *State v. Blackstone*, 74 Ind. 592.

III.

The deputy clerk of the municipal court has no authority to administer the oath in his own name. He acts as deputy only for and in his principal's name. Secs. 14 and 15, Municipal Court Act; sec. 1, ch. 101, Rev. Stats. of Ill.; *United States v. Hall*, 21 Pac. 85; *Wimbish v. Woolford*, 33 Tex. 110; *Talbott's Devises v. Hooser*, 75 Ky. 408; *Schott v. Youree*, 142 Ill. 233; 13 Cyc. 1043; 9 Ency. of Law, p. 381; *Village of Auburn v. Goodwin*, 128 Ill. 57; *Norton v. Colt*, 2 Wend. 250; *Glencoe v. Edwards*, 78 Ill. 382; *Ditch v. Edwards*, 2 Ill. 127; *Ryan v. Eads*, 1 Ill. 217; Vol. 3, "Words and Phrases," pp. 2208 *et seq.*

IV.

The testimony set forth in count III is immaterial. The cross-examination has reference to matters entirely foreign to the direct examination. Perjury cannot be assigned on cross-examination unless the original testimony is material and the cross-examination affects the credibility of the witness. *Kizer v. People*, 211 Ill. 407; *Wilkinson v. People*, 226 Ill. 135; 2 Russell on Crimes (5th Am. from 3rd London ed.), pp. 600 *et seq.*; *Pollard v. People*, 69 Ill. 148; *Young v. People*, 134 Ill. 37; *Morrell v. People*, 32 Ill. 499; *Pankey v. People*, 2 Ill. 80; 2 Bishop's New Criminal Law (8th ed.), sec. 1033; 2 Russell on Crimes (5th Am. ed.), p. 642; *State v. Budd*, 65 Ohio St. 1; *Commonwealth v. Pollard*, 12 Metc. 225.

V.

The materiality of the testimony as to the impression produced by the libel. 25 Cyc., pp. 502 *et seq.*

A. In slander cases a witness may be asked as to the impression the words made upon him, or as to the sense in which the words were understood by the hearers. *Tottleben v. Blankenship*, 58 Ill. App. 47; *Foval v. Hallett*, 10 Ill. App. 265; *McKee v. Ingalls*, 4 Scam. 32; *Nelson v. Borchenius*, 52 Ill. 236.

B. It is not permissible for readers of an alleged libelous article to testify as to its meaning. *Gribble v. Pioneer Press Co.*, 34 N. W. 30; *Quinn v. Prudential Ins. Co.*, 90 N. W. 349; *Beardsley v. Maynard*, 4 Wend. 337; *Rep. Pub. Co. v. Miner*, 20 Pac. 345; *Hearne v. De Young*, 52 Pac. 150; *Railway Co. v. McCurdy*, 8 Atl. 233; *Anderson v. Hart*, 27 N. W. 289; *Smart v. Blanchard*, 42 N. H. 137.

C. If words are not actionable in themselves, the testimony as to their effect or meaning is incompetent. *Hamm v. Wickline*, 26 Ohio St. 81.

D. Perjury cannot be assigned on cross-examination where the direct testimony was not material. *Wilkinson v. People*, *supra*; 22 Ency. of Law, 687; *Stanley v. United States*, 33 Pac. 1025.

VI.

The publication is not libelous *per se*. 25 Cyc. 250; *Cervey v. News Co.*, 139 Ill. 345.

A. An innuendo and colloquium are essential. 25 Cyc. 439, 441; *Patterson v. Edwards*, 2 Gilm. 720; *Strader v. Snyder*, 67 Ill. 404; Townsend on Slander & Libel (3rd ed.), pp. 198 *et seq.*

B. An innuendo cannot enlarge the meaning of words, or make certain that which is uncertain. There must be an averment of extraneous matter, so that the court can see that the libel is susceptible of the meaning attributed to it. 25 Cyc. 449; *Gault v. Babbitt*, 1 Ill. App. 130; *Brown v. Bur-*

nett, 10 Ill. App. 278; *Herrick v. Tribune Co.*, 108 Ill. App. 244; *Patterson v. Edwards*, 2 Gilm. 720; *Strader v. Snyder*, 67 Ill. 404; *Brown v. Brown*, 14 Me. 317; *Carter v. Andrews*, 16 Pick. 1; *Weed v. Bibbins*, 32 Barb. 315; *Railway Co. v. Sheftall*, 45 S. E. 687; *Wallace v. Homestead*, 90 N. W. 835; *Kilgour v. Newspaper Co.*, 53 Atl. 716; *Townsend on Slander & Libel* (3rd ed.), secs. 308, 335, 336, 337, 338, 341, 342; *Van Vechten v. Hopkins*, 5 Johns. 210; *Moss v. Harwood*, 46 S. E. 385; *Russell on Crimes* (5th Am. ed.), 644, 647; *McLaughlin v. Fisher*, 136 Ill. 111; *McLaughlin v. Schnellbacher*, 65 Ill. App. 50; *Newell on Slander & Libel*, secs. 18, 34, 35; *Railway Co. v. McCurdy*, 8 Atl. 230; 2 *Bishop's New Criminal Proc.* (4th ed.) secs. 785, 786, 793, 794; *Langston v. Linotype Co.*, 147 Fed. 871 (aff. 154 Fed. 42); *Ukman v. Daily Record Co.*, 88 S. W. 60; *Kenworthy v. Brown*, 92 N. Y. S. 34; *Harkness v. News Co.*, 102 Ill. App. 163; *Patterson v. Edwards*, 7 Ill. 720; *Smith v. Gafford*, 33 Ala. 168; *Jorallmon v. Pomeroy*, 22 N. J. L. 271.

VII.

If the pamphlet was not libelous the testimony given on the trial was not material *Rex v. Dunston*, R. & M. N. P. R. 109; 21 Eng. C. L. 712; *Morrell v. People*, 32 Ill. 499; *Rex v. Benesech*, Peake Add. C. 93; *Russell on Crimes* (5th Am. ed.), p. 601, 602; *Leak v. State*, 61 Ark. 599.

WINDES, J. (orally):—

In the Myers case, I heard arguments all day long and I had to cut off counsel in order to get home Saturday night. I refer to counsel for the defense; I did not cut off the state. That is on that indictment for perjury. I will not attempt to review the innumerable authorities cited to me on the argument of the cause, but I will merely state, as quickly as I can, the conclusions at which I have arrived. Owing to the great pressure of other business, I have not been able to give the full consideration to the case I should have been glad

to give. Since this argument, I have tried three manslaughter cases and a large number of less important cases.

The statute with regard to perjury reads as follows:

"Every person, having taken a lawful oath or made affirmation, in any judicial proceeding, or in any other matter where by law an oath or affirmation is required, who shall swear or affirm wilfully, corruptly and falsely, in a matter material to the issue or point in question, * * * shall be deemed guilty of perjury. * * *" (Sec. 225, ch. 38, Rev. Stats. of Ill.)

The words "material to the issue or point in question" are very important in this case, though, of course, the statute with regard to the offense is of great importance in every indictment for perjury or subornation of perjury.

There are three counts in this indictment. They all allege that the defendant Myers swore to certain things in substance. The latest expression of the supreme court of this state on this proposition is in the case of *Wilkinson v. People*, 226 Ill. 135. It seems to me to be a very carefully considered case. The court, in passing upon the sufficiency of the indictment in that case, at page 140, says:

"All the precedents to which our attention has been called in a case like this aver that it became a material matter whether the defendant made the false statements assigned for perjury in the indictment. We do not regard the averment that the testimony was material to the issue, generally, as sufficient. Moreover, the so-called second assignment of perjury, and each of those following, as shown above, is, that he, Linder Wilkinson, upon the trial of said indictment aforesaid, then and there further unlawfully, knowingly, wilfully and feloniously testified on a matter material to the issue aforesaid, in substance, etc. There is no averment here that the testimony was corruptly given, which is always necessary in an indictment for perjury. Neither is it sufficient to state the substance of the alleged false testimony."

That seems to be in conflict with all other decisions of our supreme court, as I construe them, especially *Hereford v. People*, 197 Ill. 222, 238, but being the later expression of

the supreme court, it ought to be followed, and the court in this case uses this language (226 Ill. 135, 141):

"In criminal pleading the highest decree of certainty is always required."

The second and third counts of the indictment allege, in substance, that Myers swore that he did not remember certain things that he was asked about,—the alleged perjured testimony. I think that what is said by the court of appeals of New York in *People v. Doody*, 64 N. E. 807, 172 N. Y. 165, is applicable. I did not read the decision, as I thought it was in accordance with reason clearly, and counsel on both sides argued it quite at length. While there are decisions—a number of them—to the contrary, there are none such in this state, I believe, directly to the point, and the decision in that case appeals to my ideas with regard to perjury.

It is a matter of proof as to whether or not a man remembered a specific thing. A man may get on the stand today and swear that he did not remember certain things material to the issue in question, and it would be shown by a hundred witnesses that he had said two hours before that he did remember all about it. Of course, that is an extreme case, but insofar as the indictment alleges that he did not remember so-and-so, I think it is good. It is a matter of proof.

The first, second and third counts of the indictment all fail to allege, in direct terms, that the alleged false testimony was material to the issue in the case that was being tried. I have read you the section of the statute. It says, "A matter material to the issue or point in question." There must be no doubt, I think, from the allegations of the indictment, that the alleged false testimony was material to the issue, and in this last decision to which I have referred, the *Wilkinson* case, the court uses this language (p. 145):

"It is well understood that in every prosecution for perjury it is essential that the alleged false testimony must have been material to the issue upon trial."

Now, a matter may be material in a suit when not material to the issue. There are numerous authorities to that effect, for instance, on the question of credibility. A matter

may be material, but not material to the issue. Now, the third count alleges—I mean it is claimed that the testimony set up in the third count, which it is alleged was false, was the cross-examination of the witness. Now, it is said that the testimony on the direct examination was not material to the issue. There is some doubt in my mind whether, strictly speaking, it is material to the issue in the libel case, but from a reading of *Nelson v. Borchenius*, 52 Ill. 236, and *Dexter v. Harrison*, 146 Ill. 169, 173, and the appellate court cases cited by counsel for the state,¹ I think that the testimony there referred to and alleged to be perjury is, in part, material. I think it is material here. Speaking of the person Andrews, with whom he had talked:

“Q. What, if anything, did Andrews say to you?”

Now, that I do not regard material.

“Q. State to the court what impression the reading of it made upon you, as to whether it was intended to charge Robert D. Lay with surreptitiously and wrongfully appropriating from the funds of that company \$8,000 in excess of his salary?

“A. It made no such impression.”

Under *Nelson v. Borchenius*, 52 Ill. 236, I think that part was material to the issue as to how the libel would be considered. Also this:

“Q. State whether or not, in your opinion, the language used is or is not compatible with perfect honesty on the part of Lay?

“A. Yes.”

That testimony is material, I think, but there is not a word of the cross-examination that relates to that part of the testimony of the witness. Therefore, it is not germane, I think, to the direct testimony, and it could not, for that reason, be assigned as perjury. That is decided in the *Wilkinson* case, also.

A number of other points were made by counsel in the

¹ *Tottleben v. Blankenship*, 58 Ill. App. 47; *Foval v. Hallett*, 10 Ill. App. 265. See also *McKee v. Ingalls*, 4 Scam. 30.—Ed.

argument, but it seems to me that they are mostly very technical, and it is not necessary to go into them.

For the reason that I have stated here, that all the counts allege that the testimony which is claimed to be perjury was in substance as follows, and that the testimony set up in the three counts is all cross-examination not germane to the direct, perjury cannot be assigned thereon, and because none of the counts allege clearly and directly that the testimony was material to the issue in the case, I will quash all the counts of the indictment. }

(Recorder's Court of Chicago.)

The People ex rel. Dennis Graufield

vs.

George W. Perkins, Superintendent of the Reform School.

(1868.)

1. **MUNICIPAL CORPORATIONS—JURISDICTION OF CITY COURT OVER REFORM SCHOOL LOCATED OUTSIDE OF CITY LIMITS.** Although the Reform School of Chicago is beyond the city limits, the recorder's court has jurisdiction as it is a city court and whatever locality the corporation holds in its character of land proprietor and governs by its common council, is within the territorial jurisdiction of that court.
2. **STATUTES, CONSTRUCTION OF—PARI MATERIA.** It is a familiar rule of construction that when certain things are specified in a statute and followed by general words as in this case "other writ or process," nothing will be included under the general words except what belongs to the same class as specified.
3. **SAME—HABEAS CORPUS—NATURE OF WRIT.** The writ of habeas corpus is an original writ and not an auxiliary one, differing in this respect from the writs of *ne exeat* and injunction. Like the writ of certiorari it is one of right and will never be deemed taken away by implication.
4. **REFORM SCHOOL ACT OF 1863—JURISDICTION OF JUDGE—WHAT NECESSARY.** Under the Reform School act, the judge does not act as a court but as an officer with special and limited juris-

diction, in which case there is no presumption in favor of jurisdiction but compliance with every provision of the statute is essential to jurisdiction.

5. SAME—WANT OF SERVICE—EFFECT. If the summons provided for by the Reform School act be not served upon the party indicated in the statute, the want of such service defeats the jurisdiction of the officer and renders the commitment void.
6. CONSTITUTIONAL LAW—STATE AS PARENS PATRIAE—ITS POWER. The power of the state as *parens patriae* in a proper case, extends only to the placing of others over the child with the same limited authority as a parent would ordinarily have.
7. SAME—INVOLUNTARY SERVITUDE—BILL OF RIGHTS—REFORM SCHOOL ACT. A reform school act, which purports to authorize others to seize a child and confine him in prison for many years and compel him to labor for their benefit without a regular trial or an accusation of crime against him, deprives the child of his liberty without "due process of law," and amounts to involuntary servitude not as a punishment for crime.

Walter & James V. A. Butler, for the relator.
Hasbrouck Davis, for the reform school.

MCALLISTER, J.:—

The writ of *habeas corpus* was allowed in this case for the purpose of inquiring into an alleged illegal imprisonment of one Dennis Graufield, a boy a little over fourteen years of age, and who has been confined since the 20th of July, 1866, in the reform school of the city of Chicago. The writ was served on the superintendent at the reform school, and he admitted due service. He appeared, however, by the city attorney, who moved to quash the writ on two grounds, viz:

1. The reform school being beyond the city limits, the court has no jurisdiction.
2. The statute, defining the powers of the court, requires ten days' notice of the application of the writ.

He also moved that the case be transferred to the superior court of Chicago.

Neither of the grounds stated for the motion to quash is tenable.

First, then, as to jurisdiction: The recorder's court is a city court; and whatever locality the corporation holds, in

its character of land proprietor, and governs by its common council, is within the territorial jurisdiction of this court. The institution in question is called "The Reform School of the City of Chicago." The site upon which it stands was, pursuant to authority, given by the legislature, selected and purchased, and is held by the city for that purpose; and the institution, by the same authority, was committed to the full control of the city. This locality is as much a part of the city as any portion of Lake street is; and a crime committed there, if otherwise cognizable by this court, would be as clearly within its jurisdiction as if committed in the armory.

Secondly. As to the ten days' notice: If the position of the city attorney is correct, then, when a person in jail is ready to give bail in cases pending in this court, and desires a writ of *habeas corpus* for that purpose, he must give the sheriff ten days' notice, lie in jail until the time expires, and then the sheriff may, by filing a request, as is done in this case, have the application transferred to another court. The act creating this court clearly gives it power to issue the writ of *habeas corpus*, the same as the circuit court may. The subsequent act relied on declares that "Neither the said recorder's court, nor the judge thereof, shall grant any writ of *ne exeat*, injunction, or other writ or process, which said court or judge shall have power to issue in civil cases, excepting original writs of summons, *capias*, attachment, etc., unless the person against whom such writ is granted shall have ten days' notice," etc.

It is a familiar rule of construction that, when certain things are specified in a statute, and followed by general words, as in this case, "other writ or process," nothing will be included under the general words except what belongs to the same class as those specified. The writs that are here specified are such as are auxiliary to the original process and proceedings. The writ of *habeas corpus* is not auxiliary to any other writ; but is the original summons. The writ of *habeas corpus*, like the common-law *certiorari*, is one of right and will never be deemed taken away by implication. The motion to quash the writ, and transfer the case to the superior court must be overruled.

We must, then, meet the questions involved on the merits of the case, viz: Was the boy Dennis Graufield illegally committed to the reform school, and is he there illegally detained? The evidence in the case shows that at the time of his capture he had and still has both father and mother living in this city. His father was and is in good circumstances, worth, as he states, between \$10,000 and \$15,000; had a good and respectable home, at which the boy lived, and had as good parental care as a majority of children in the city. He was not accused, indicted, or convicted of any crime, but was brought before Judge Jameson of the superior court, acting as commissioner under the reform school act, and, by his order, committed to the reform school, and that commitment is the only legal cause for his caption and detention relied upon. The city attorney strenuously insists that this commitment is final and conclusive upon the whole world. If this be true, there exists among us a power of the most dangerous and alarming character. This boy's parents were well settled and known citizens of the city. They were able and willing to take care of him, yet he was seized, and, without their knowledge, taken to the reform school, as it is called, wherein the superintendent claims the right to detain him until he is twenty-one years of age. So, in the same way, by the exercise of this power and its easy abuse, the little boy, of the tenderest of parents, may be seized whenever he has reached the age of six years and a day, and be sent to the same supposed reform school, and there detained in spite of the tears and wailings of his parents until he is twenty-one. There is no appeal from the decision of the judge, and no writ of error will lie. Even the governor cannot release by pardon, because there is no offense to pardon. The only possible avenue of relief would be through the discretionary action of the board of guardians, which may be composed of men jealous of power or fond of it. Are the free-born subjects of this state, really, by the law of the land, to be placed in a position where, being themselves wholly innocent of crime, and their children likewise innocent, they are to be forced to beg on their knees, before some board, for the privilege of enjoying the

custody and society of their own children! These are grave questions, and from the cases that have come before this court may well be asked at every fireside. I propose now to analyze this claim of power, and see whether it have legally any foundation or not.

The father who, by law, is entitled to the custody and earnings of his child during his minority, comes and claims that custody. The respondent says no. By a legal proceeding you have been divested of that right, and it has been vested in me, and shows the commitment of a judge of the superior court to establish his position. If the statute under which this proceeding was had has any validity, it is one not according to the course of the common law or any regular proceedings in the courts. It is a special proceeding. The judge does not act as a court; but as an officer with special and limited jurisdiction, in which case there is no presumption in favor of jurisdiction, but compliance with every provision of the statute essential to jurisdiction must be shown. The eighth section of the original act requires the commissioner to issue a summons or notice to the father of the boy, if living and resident in the city, to appear before him at such time and place as he shall in such summons or notice appoint; and to show cause, if any there be, why the said boy shall not be committed to the reform school. And upon appearance before him of the party named in said summons or order, or if, after due service had of the summons or order, there shall be no such appearance, the said commissioner shall, upon expiration of the time named in said summons or order for said appearance, proceed to examine said boy, etc. Municipal laws, pp. 132, 133. By the fourth section of the act of 1867, in reference to the reform school, the powers and duties of the commissioner are conferred upon the judges of the superior and circuit courts.

Before the judge has jurisdiction to proceed and examine the boy, the summons or notice mentioned must be served upon the father, if a resident of the city, and, in the absence thereof, the judge has no more power or authority to commit than the mayor would have.

The records of the superior court in this case were produced, and no summons or notice appears; none is recited, nor is it claimed that any of the papers are lost. There is upon this point something rather singular. It is not probable that a judge of the high character of Judge Jameson would proceed to commit without he supposed he had complied with the statute in this particular. And, it is quite probable from all that does appear, that he was imposed upon by somebody. The parents swear most explicitly that they, neither of them, had any notice. The respondent says in his return: "I further return that said judge of the superior court of Chicago did issue the summons required by the provisions of said acts, and caused the same to be served prior to the examination of said boy."

Served upon whom? If it is known upon whom served, why not say upon whom? It certainly was not the father of the boy. This return and the absence of the pretended summons, together with the fact that the father was not served, gives rise to the suspicion that somebody falsely personated the father, and thus imposed upon the judge. At all events, the want of service defeats the jurisdiction of the officer and renders the commitment void.. *Burdick v. Blook*, 1 Hill (N. Y.) 130, and cases there cited.

But could this commitment be upheld, even if every provision of the statute had been complied with? The nature and character of this so-called reform school have been fully investigated in this court upon the testimony of the assistant superintendent himself, and other evidence. It is called by the pleasant name of school; but is in reality a prison. It is just as essentially a prison as the state prison at Joliet. The inmates are subject to a coercive system of labor, for the benefit of the institution or superintendent; and it is as rigidly enforced as at the state penitentiary. As a prison for juvenile offenders, who have been indicted and convicted, it is far preferable to the jail or bridewell. But I deny the authority of any man, or set of men to seize boys who are innocent of crime, and hold them in prison subject to involuntary servitude. The worst burglar in the state can be

sent to the state penitentiary for only fourteen years; and yet by this system, a child who has attained the age of six years and one day may be seized and imprisoned like the burglar, subject to the same system of hard labor for fifteen years, although as innocent as when his eyes first saw the light of heaven.

If such a power exist whence is it derived? The learned counsel for the respondent says: From the state as *parens patriæ*.

Before and at the time of American independence, the sovereigns of England claimed and exercised many prerogatives as parent of the country. Through his court of chancery he appointed guardians for infants and committees for the custody of idiots and lunatics. "The king as *parens patriæ* has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor." 3 Bl. Com. 428. In *Wheeler v. Smith*, 9 How. (U. S.) 55, 78, the supreme court of the United States, McLean, Justice says: "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment, and to this we must look in our judicial action instead of the prerogatives of the crown. The state as a sovereign is the *parens patriæ*."

The sovereign will is made known to us by legislative enactments. But it is also expressed by the constitution, which contains many limitations by which the legislative power is controlled. Never since the days of the Magna Charta was it lawful for the sovereign of England, as *parens patriæ*, to keep infants innocent of crime, imprisoned during their minority. And in this state the power extends only to the placing of others, under circumstances, in the place of parent with the same limited authority. A parent may use moderate chastisement; have custody and control of his children; but he cannot keep them in continuous imprisonment. "When necessary to the discharge of parental duty he may resort to corporal discipline. He may impose such tempo-

rary confinement as may be necessary to secure obedience to his reasonable commands, so that it is not prejudicial to the life, limb, or health of the child." Hurd on Habeas Corpus, 43. Again, on page 45, the same author says: "Temporary confinement is allowed as a means of enforcing obedience to reasonable commands. But this power must also be exercised with moderation." Such temporary confinement would not probably be deemed imprisonment within the inhibition of the constitution. Section 8 of article 13 of the constitution of this state declares: "That no freeman shall be imprisoned or disseized of his freehold liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property but by the judgment of his peers, or the law of the land."

"It may be received," says Kent, "as a proposition universally understood and acknowledged throughout this country, that no person can be taken or imprisoned; or disseized of his freehold or estate; or exiled or condemned; or deprived of life, liberty or property, unless by the law of the land, or the judgment of his peers. The words 'law of the land,' as used originally in Magna Charta, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of due process of law is, that it means law in its regular course of administration, through courts of justice." 2 Kent's Com. 13; Story's Com. on Constitution, vol. 3, 661; *Taylor v. Porter*, 4 Hill (N. Y.) 140, 146. "The law of the land, in the bill of rights," says Chief Justice Ruffin in an elaborate opinion delivered in *Hoke v. Henderson*, 4 Dev. (N. C.) 15, "does not mean merely an act of the legislature, for that construction would abrogate all restriction upon legislative authority. The clause means that statutes which would deprive a citizen of the rights of persons or property without a regular trial according to the course and usage of the common law, would not be the law of the land in the sense of the constitution."

That the statute in question, which purports to authorize

others to seize a boy and confine him in prison for so many years, and compel him to labor for their benefit, without even an accusation of crime against him, is just such a statute as the principles of the bill of rights make void, there can be no doubt. "There shall be neither slavery nor involuntary servitude in this state except as a punishment for crime, whereof the party shall have been duly convicted," says the constitution, yet there is a system of involuntary servitude rigidly enforced in this institution upon those who have committed no crime, or been subject to any accusation, enforced, too, by all the powers incident to close imprisonment. Nothing but the audacity of corporate power could complacently insist upon carrying out such a statute against innocent boys. "It requires," says the great luminary of American law, "more than ordinary hardness and audacity of character to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of right are part of the muniments of freemen showing their title to protection, and they become of increased value when placed under the protection of an independent judiciary, instituted as the appropriate guardian of private rights." 2 Kent's Com. 8.

It is considered by the court that Dennis Graufield is unlawfully imprisoned in the reform school of the city of Chicago, and accordingly ordered that he be forthwith discharged therefrom.

NOTE.

In *People ex rel. O'Connell v. Turner, Superintendent*, 55 Ill. 280, the supreme court held the same law unconstitutional on reasoning similar to that of Judge McAllister in the principal case.

In *re Petition of Ferrier*, 103 Ill. 367, it was held that the act of 1879, establishing industrial schools for girls who lacked proper parental care, were dependent upon the community for support or were

surrounded by vicious influences, was constitutional. The court puts its decision on the ground that the institution created by the statute is in fact a school and not a prison and that the state under the act is only assuming its character of *parens patriae* in cases where the parents of the girl are incapable guardians of the child's welfare.

The industrial school act of 1879, was again held to be constitutional and no infringement of the right of personal liberty in *County of McClain v. Humphreys*, 104 Ill. 378.

In *People ex rel. Schwartz v. McLain*, the supreme court of Illinois had before it the question of the constitutionality of the Juvenile Court Act of 1899, and an opinion was rendered therein on December 20, 1905. A petition for a rehearing was subsequently filed but while under consideration, the case itself was dismissed and the opinion of December 20, 1905, withdrawn. The opinion although not binding as a precedent is nevertheless of considerable interest, and for that reason it is here reprinted in connection with the above decision. The court in its opinion holds:

1. That a commitment of a boy to a state institution on the sole ground that he has been guilty of a misdemeanor in proceedings to which the parents are not parties, deprives the parents of the right to pursue happiness and of their rights in the boy's services, without due process of law.

2. Mere violation of law cannot constitute delinquency where there is no such unfitness on the part of the parents to care for the boy as gives the state the right to substitute its care for that of the parents.

3. That the provision for a trial by a jury of six is not unconstitutional since the proceeding is not criminal in its nature, the commitment being to an actual school wherein the state truly assumes the character of *parens patriae* and not to a prison wherein the boy is really held and punished as for crime.—Ed.

PEOPLE EX REL. SCHWARTZ V. McLAIN.

Original petition for habeas corpus by the people, on the relation of Joseph Schwartz, against Nelson W. McLain. Writ granted.

Louis Brandes, for relator. *Peck, Miller & Starr* and *Pence & Carpenter* (*Merritt Starr* and *George A. Carpenter*, of counsel), for respondent.

Boggs, J. This is a petition for a writ of habeas corpus, filed originally in this court. The petition avers that Samuel Schwartz, a son of the petitioner, of the age of 14 years, is unlawfully restrained of his liberty by the respondent, Nelson W. McLain, in his official capacity of superintendent of the St. Charles Home for Boys.

It appears from the pleadings on which the cause has been submitted for decision that the relator, Joseph Schwartz, is a resident, and on the 20th day of June, 1905, was a resident of the city of Chicago; that he was the head of a family consisting of himself, his wife, Rachel, and their son, Samuel; that he (the relator) provided his wife and said Samuel, his son, with a comfortable, quiet and orderly home, and maintained and supplied them with food and clothing, and supplied said Samuel with books and stationery, etc., and caused him to attend the public schools, and that relator in all respects performed and discharged his duties as parent toward said Samuel, and that he (the relator) is a reputable and law-abiding citizen, and that the parents of said Samuel have not been guilty of any act inconsistent with the correct and moral control and custody of their son; that on that day a complaint or petition was filed in the circuit court of Cook county, on the chancery side thereof, charging said Samuel with two violations of the provisions of section 55 of the Criminal Code of the state, in that he made "repeated indecent assaults upon Jennie Coliff and other repeated and indecent assaults upon one Fanny Cohen, all within the past two months and in the city of Chicago, county of Cook, and state of Illinois; that the said Jennie Coliff and said Fanny Cohen were then and there at the time of said assaults, and each of them was, a female child under the age of 14 years; that the said Jennie Coliff then and there resided at 72 Wilson street, in said city of Chicago, county of Cook, and state of Illinois; that said Fanny Cohen then and there resided at 88 Wilson street, in said city of Chicago, Cook county, Ill.; that said assaults were, and each of them was, publicly committed in the rear of 92 Wilson street, in said city of Chicago, Cook county, Ill., and said assaults were, and each of them was, an act of disorderly conduct and a notorious act of public indecency tending to debauch the public morals;" that subsequently, in pursuance of proceedings in the said circuit court under said petition, a decree was entered finding said Samuel guilty of the acts of disorderly conduct and of public indecency tending to debauch the public morals, charged against him and in violation of said section 55 of the Criminal Code, and declaring said Samuel to be a ward of said court, and ordering that he be committed to the St. Charles Home for Boys, there to remain until he should arrive at the age of 21 years, unless sooner discharged according to law; and that the respondent restrains said Samuel in said home for boys in virtue of this order of the court.

It appears from the transcript of the proceedings that the order that the boy Samuel should be taken from the custody of the relator, his father, was not on the ground that the relator had in any way failed to provide or care for the said Samuel, or had neglected to

exercise proper restraint over him, or that his habits or conduct were injurious to the moral or physical interests of the boy, but solely on the ground the boy had, by disorderly conduct and the acts of public indecency before mentioned, violated section 55 of the Criminal Code. The relator and his wife, Rachel, the mother of the boy, were cited to bring Samuel, the son, before the court to answer the charges of disorderly conduct and acts of public indecency, but were not made parties to the proceeding, nor were there before said court any charges of the omission of parental duty and care preferred against them, nor did the order entered by the court proceed on the theory the relator or his wife, Rachel, had, by any parental delinquencies, lost the right to keep their son in their family and rear their boy and enjoy his society and receive the benefits of his labor and services. The decree that the boy shall be the ward of the court and should be taken from his home and the custody and care of his parents was based solely on the ground that the boy had committed the misdemeanors aforesaid in violation of the provisions of said section 55 of the Criminal Code, the violation whereof said section 55 provides shall be punished by the infliction of a fine in any sum not exceeding \$200 for each offense.

The proceeding in the circuit court, which resulted in the decree committing the said Samuel Schwartz to the St. Charles Home for Boys, was in pursuance of one of the provisions of the act of the General Assembly entitled "An act to regulate the treatment and control of dependent, neglected and delinquent children," in force July 1, 1899. 4 Starr & C. Ann. St. Supp. 1902 p. 375. In order to accomplish the purposes indicated in the title, the act provides that a petition in writing, verified by affidavit, may be filed in the circuit or county court, setting forth facts showing that a child in the county is either neglected and dependent or delinquent, and praying for proceedings to be had and taken under said petition for the disposition of such child as shall be found to be neglected and dependent or delinquent. Section 1 of the act defines a delinquent child as follows: "The words 'delinquent child' shall include any child under the age of sixteen (16) years who violates any law of this state or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly frequents a house of ill-fame; or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated." Section 9 of the act purports to authorize the court to commit any child so found to be delinquent, if a boy, to a training school for boys, or to "any institution within the county, incorporated under the laws in this state that may care for delinquent children, * * *

or to any state institution which may be established for the care of delinquent boys." It was in virtue of this provision of the said act that the said Samuel Schwartz was ordered by the circuit court of Cook county, to be taken from the custody of the relator, his father, and committed to the care of the respondent, as the superintendent of the St. Charles Home for Boys, on the ground that the boy had violated, in the manner hereinbefore related, the provisions of said section 55 of the Criminal Code, and had thereby become deemed to be a delinquent boy, within the meaning of said statute.

If this enactment is effective and capable of being enforced as against the relator, father of the boy, it must be upon the theory that it is within the power of the state to seize any child under the age of 16 years who has committed a misdemeanor punishable under the Criminal Code of the state by fine, or who has violated an ordinance of any city or village of the state, and take him from his home and from the custody of his father and the care of his mother and commit him to a state institution which may be established for the care of delinquent boys, and there keep and train and raise him, though the father may have always provided a comfortable, quiet, orderly, and moral home for him, and have supplied him with school facilities, had not neglected his moral training, and had been and was still ready to render to him all of the duties of a parent. We do not think it is within the power of the General Assembly to thus infringe upon parental rights. At the common law and at the time of the adoption of the Constitution of 1870, the father possessed the legal right to the care, custody, and control of his minor children, and was entitled to the services and earnings of such children. These parental rights cast upon the father, as a corresponding obligation, the duty to maintain, support, and educate the children, and to treat them with kindness and affection. Section 1 of the Bill of Rights (Const. 1870, art. 2, § 1) guaranties protection to the inherent and inalienable rights of men, among these rights being "the pursuit of happiness;" and section 2 of the same article of the Constitution protects the parent against the destruction of his property rights in the services of his child without due process of law.

The right of the parent to the care and custody of the child has its foundation in the love and affection which nature has implanted in the heart of the father for his offspring. It is one of the strongest and deepest emotions of the human mind and heart, exists as a prompting of nature for the protection and safety of the child, and conduces largely to the happiness of the parent. It is difficult to define "pursuit of happiness" but it is clear it comprises the right to enjoy the "domestic relations and the privilege of the family and the home." Black on Constitutional Law, § 204. To guaranty to a

parent the right to the pursuit of happiness forbids that he should be deprived of the right to the custody, the association, and the society of his child, or of his right to teach and train the mind of the child and fit it for the walks of life, unless considerations affecting the public welfare require such rights shall be abridged or surrendered for the general good of the state. The parent may, by reason of his failure to appreciate and perform that which is requisite to the moral, intellectual, and physical welfare and development of the child, forfeit his right to the custody and care of his child. The public welfare is concerned in the culture, education, and moral training of children, and the state may supplant the parent as custodian and protector of the child, if the delinquencies or unfitness of the parent require that the child shall be deemed the ward of the court, acting for the public. The child may be found to be so possessed of and controlled by wicked degeneracy, or so incorrigibly evil, and the parent so indifferent to the moral and intellectual growth of the child, or so otherwise unfit to be intrusted with the power to train and cultivate the mind and conscience of the child, that it may become lawful to commit the child to the public care and custody. In such an event the right of the parent may be deemed secondary to that of the general public as organized for the safety and welfare of mankind. But no such public considerations are here shown to exist. The boy, Samuel, has been shown to be guilty of offenses which in an older and more matured person would be but a misdemeanor, punishable only by a fine of not exceeding \$200 for each offense. He is not a dependent, neglected child. His father has not, by any act or omission on his part, forfeited his right to care for and enjoy the society of and train his son for the duties and responsibilities of manhood. That extraordinary exigency which may justify the state in supplanting the father as the natural custodian and protector of his son does not here exist.

The property right of the father in and to the services and labor of his son during his minority would also, under the circumstances of this case and under the proceedings here under consideration, to which the father was not a party, be unlawfully infringed by the assumption on the part of the state of the control and custody of the son on the mere ground that the son had committed the misdemeanor in question. The statute here relied upon to justify the detention of said Samuel as a delinquent child, under the circumstances of the case, infringed the constitutional rights of the father, and cannot be enforced. What is here said has no reference to the statute regulating the disposition to be made of "dependent or neglected" children. Moreover, it is to be understood we do not hold the statute regulating the disposition to be made of delinquent children to be

unconstitutional *in toto* and as to every parent or as to all children, but that under the circumstances of this particular case constitutional rights of the father have been infringed, and therefore the detention of Samuel Schwartz in the St. Charles Home for Boys cannot be justified or upheld.

There is no force in the contention so strenuously advanced by counsel for the relator that the proceedings under this statute are criminal proceedings, and that a boy who is the subject of judicial investigation under this statute is entitled to a trial by a jury of 12 men. The proceeding is statutory, and its object is, not the enforcement of the criminal law, but the protection of children. Infants are, in general, in a sense wards of courts of chancery, and the practice and procedure in causes under this statute, affecting, as they do, the care and custody of minors, and being for the protection of infants, should be that of courts of equity, so far as consistent with the provisions of the statute. The commitment to the home for boys, in cases in which the statute is applicable and is properly enforced, is not imprisonment as punishment for the violation of the criminal laws of the state or the ordinances of cities and villages, but is merely the assumption of the state, in its capacity of *parens patriæ*, of parental authority for the education and reformation of the child, and the home for boys is not to be regarded as a prison, but is, in fact, a home and a school established by law for the benefit and good of those who are found, under the provisions of the statute, to stand in need of parental care and means of reformation and intellectual and moral training. Such is the general view of statutes and institutions of this character. *Petition of Ferrier*, 103 Ill. 367, 43 Am. Rep. 10; *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328, 22 Am. Rep. 702; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388; *Scott v. Flowers*, 60 Neb. 675, 84 N. W. 81; *In re Mason*, 3 Wash. St. 609, 28 Pac. 1025. The provisions of section 2 of the act prescribing the procedure as to trial by jury is constitutional and valid. *Petition of Ferrier, supra*.

The judgment of this court will be that the detention of said Samuel by the respondent, in his official capacity as superintendent of the St. Charles Home for Boys, is without sufficient warrant of law; that the relator is entitled to the custody of said Samuel, his son. Judgment will therefore be entered awarding the custody of said Samuel Schwartz to the said relator according to the prayer of his petition.

Writ granted.

(Municipal Court of Chicago.)

J. C. Beifeld

vs.

Chicago & Northwestern Railway Company.

(October, 1908.)

1. **CARRIERS—EXCESS BAGGAGE—DELAY IN DELIVERY—NEGLIGENCE—VALIDITY OF EXEMPTION CLAUSE.** Where excess baggage is delayed in transit through the negligence of the carrier the latter is not freed of liability by reason of a stipulation in its contract of carriage to the effect that it is to be released from all liability from loss, injury or detention of the property whether due to the negligence of the carrier or not, such a stipulation being contrary to public policy.
2. **SAME—OBJECTION THAT ARTICLES NOT BAGGAGE—WAIVER.** A carrier, accepting as baggage articles or merchandise not properly having that character with knowledge that they are offered for transportation as baggage, waives any objection on that ground and his liability therefor is the same as that with reference to baggage in general.
3. **SAME—DAMAGES—LOSS OF PROFITS.** The ordinary profits of a traveling salesman calling on regular trade are not so speculative as not to be recoverable as damages for detention by a carrier of his sample trunks precluding him from making sales.
4. **SAME—NOTICE OF CONTENTS.** The evidence in this case is sufficient to charge the carrier with notice of the contents of plaintiff's trunks and his use for them so to make it liable for damages resultant upon their detention.

Action on the case. Heard before Judge Foster. The facts are stated in the opinion.

Coburn & Case, attorneys for plaintiff.

William S. Kies, attorney for defendant.

FOSTER, J.—

In this case the plaintiff, a traveling salesman, checked his baggage for Milwaukee on Sunday, October 6, 1907, over the defendant's road, but one of his trunks, which was then in Chicago and in the defendant's possession, was not forwarded until Thursday, October 10, when pursuant to instructions it was sent to Appleton, but did not arrive there until after the

plaintiff had left, and he first saw it on his return through Appleton on Friday, October 11. He did not, however, stop to get the trunk, and it was forwarded to him and finally received by him Saturday night. The trunks had upon them his business card as follows: "J. C. Beifeld, 225 Dearborn St., Chicago. Representing Eastern Manufacturers of Cloaks and Suits," and in checking them for Milwaukee the following conversation with the agent of the defendant was held: "I asked the baggageman to check these two sample trunks to Milwaukee so that they would get there this evening, and he took the checks from me. He asked me how much excess I had; I said 300 pounds, and I paid him the excess out of the same book and told him, 'These are sample trunks and must arrive in Milwaukee this evening.' He said, 'They certainly will.'"

In checking his baggage the plaintiff offered excess baggage coupons from the regular book of the company which had been signed by the plaintiff without, as he testifies, any knowledge of the stipulation therein contained limiting the liability of the company as set forth below.

It appeared that the plaintiff was an experienced travelling man and had been using excess baggage coupon books for years, but whether the other books that he had used contained this limitation does not appear. The clause referred to reads as follows:

"In consideration of the reduced rate at which this ticket is sold to me and of the receipt hereunder of any property other than legal baggage which may be at any time so received, I hereby forever release the railroad companies upon whose lines this baggage ticket is available from all liability for loss, injury or detention of any such property other than legal baggage, whether the loss, injury or detention be caused with or without negligence of any of said companies or its employes."

It is contended by counsel for the defendant that the above exemption from liability is binding, and it is urged that as the railroad company was not, as a common carrier, bound to accept sample trunks as baggage, it could impose such terms as it saw fit, even to the point of exempting itself from negligence of its own employes.

It would seem that the question to be decided here is whether this case falls within the doctrine of *Blank v. I. C. R. R. Co.*, 182 Ill. 332, and *C., R. I. & P. R. R. Co. v. Hamler*, 215 Ill. 525, on the one hand, or within the doctrine of *I. C. R. R. Co. v. Beebe*, 174 Ill. 13, and *I. C. R. R. Co. v. Anderson*, 184 Ill. 294, on the other hand. The first two cases hold that contracts exempting railroad companies from liability for injury to employes of express companies and the Pullman Palace Car Company riding on special cars and attending to their employers' special business, are binding, while the last two cases hold that contracts exempting railroad companies from liability to the owner or agent accompanying stock or goods shipped over the railroad, are invalid as being against public policy.

In *Blank v. I. C. R. R. Co.*, 182 Ill. 332, on page 339, the supreme court said:

"An attempt is made to liken this case to the case where a person is carried with his stock or goods and where he is regarded as a passenger. There are many such cases where the carrier is bound to receive and carry goods or stock, and where, by general usage or by the rules of the company, the owner or his agent may go or is required to go in charge of the property. In such cases the owner is entitled to demand the carriage of his property as a part of the duty of the railroad company toward the public as a common carrier, under the conditions fixed by law. The railroad company is bound to receive and carry for anybody who shall appear, and by the rules or usage of the company the charge for carrying the stock includes the carrying of the person in charge. Such a person is a passenger. But the difference in the relation between such a case and this is apparent."

We think the most significant portion of this paragraph is the statement that "such a person is a passenger." There can be no question that in the case at bar the plaintiff was a passenger, and we believe that when the railroad company once accepted the sample trunks of the plaintiff as baggage its liability for such sample trunks became the same as that for any ordinary baggage. It seems to us clear that such a case, as the one above falls within the rules applicable to the car-

riage of stock and their accompanying owner rather than within the rules applicable to cases of express agents and Pullman porters, who are not, as is expressly stated in the cases above referred to, passengers. That the defendant company was charged with notice of the contents of these trunks is, we think, clear on the evidence, which will be discussed more at length in considering the question of damages. It is doubtless true that the company could have refused in the first instance to take the plaintiff's trunk as baggage, but the carriage thereof was merely incidental to the contract existing between defendant and plaintiff and creating the relation of carrier and passenger. It is like the stock cases, where the owner is carried along as incidental to the shipment of his stock. In both cases there is a contract relation existing between the carrier and the passenger, thus distinguishing these cases from the cases where an express agent or a Pullman porter has no contract with the carrier but only with their several employers. When the company chose to accept these sample trunks and their contents as baggage, it assumed all duties with regard thereto of a common carrier.

In *L. S. & M. S. Ry. Co. v. Hochstin*, 67 Ill. App. 514, Mr. Justice Waterman at p. 517 said:

"The carrier having, after being informed as to the character of the articles, received them as baggage, is liable for their loss, although they consisted of merchandise."

See also *Hamburg American Packet Co. v. Gattman*, 127 Ill. 598, at 610.

In 6 Cyc. 668, it is said:

"If the carrier accepts as baggage articles or merchandise not properly having that character, with knowledge that they are offered for transportation as baggage, he thereby waives any objection on that ground, and his liability therefor is the same as that with reference to baggage in general."

It is contended on behalf of the defendant that even if the above contract is invalid and the defendant liable as a common carrier that only nominal damages can be awarded, first, because it is said that the damages attempted to be proven, to-wit: loss of profit, are in their very nature too speculative and

uncertain, and next, because it is claimed that the defendant was not chargeable with notice of the purpose for which the plaintiff desired his sample trunks in Milwaukee. The facts bearing on the question of the damages as disclosed by the evidence are as follows: The plaintiff had two sample trunks, one of which was forwarded promptly and received by him in Milwaukee in due time. This contained samples of children's clothing. The other trunk, which was delayed, contained his samples of ladies' clothing. He testified that his season for selling children's clothing was early in the year, and that during October and November he usually sold only a small amount of children's clothing, but that on ladies' clothing his sales during the years 1904, 1905 and 1906 had been \$40,000 per year, on which he received eight per cent commission. That he sold to pretty nearly the same people (p. 26); that his sales varied (pp. 37 and 38) according to the styles and seasons, and that he could not tell just what he was going to sell. That during the days he was without his sample trunks he failed to sell any of the ladies' clothing, and that he afterwards revisited the same places and sold perhaps a quarter of his ordinary sales. During these days he made some small sales of children's clothing, in the amount of about \$1,300. That his expenses for the months of October and November were about \$600.

We will first discuss whether from the very nature of the case the damages attempted to be proven by the plaintiff were too speculative under the authorities, and then we will discuss the question as to whether or not the defendant had sufficient notice of the character of the damages to make it liable therefor.

In the following cases evidence of actual profits in the past was held admissible as affording a basis for calculating probable profits of which the plaintiffs were deprived by acts of the defendants: In *Chapman v. Kirby*, 49 Ill. 211, the profits of a planing mill business for past six months were admitted in evidence. In *Fitzsimmons v. Munch*, 79 App. 538, in the same way the profits of a flour mill for the past ten years were admitted. In *C. & E. R. R. Co. v. Meech*, 163 Ill. 305, a paint-

ing contractor, who employed others to assist him, was allowed to testify as to how much he had earned as a painter without regard to any special contracts for some years prior to the accident. In *I. C. R. R. Co. v. Byrne*, 205 Ill. 9, the profits of a theatrical performance in Bloomington at previous performances were admitted. This case and the next case, it might be noted in passing, were actions on contract, and our courts seem to apply the same rule of damage in such an action that they do in an action of tort. In *Landis v. Wolf*, 206 Ill. 392, which was a suit on an injunction bond, the profits of a farm were held to afford a proper basis of damages.

In *Chicago Union Traction Company v. Brethauer*, 223 Ill. 521, the court held that it was competent for the plaintiff, who was a jewelry jobber, to testify that his profits had been \$500 per year, it appearing that he had no clerks or assistants and probably no capital invested. The court says at p. 531:

"Appellant in discussing this assignment of error, construes what the witness says as 'profits' in his business, and argues from this assumption that future profits of a commercial business are too uncertain and speculative to form the basis of a verdict in a personal injury case."

The court held to the contrary.

On the other hand, in *Chicago City Railway Company v. Flynn*, 131 App. 502, it was held that evidence as to how much the plaintiff would have made in his coal business was too speculative and uncertain to be recognized as an element of damages, the court stating that there might have been some special deals made by the plaintiff in these previous years, and compared his business to that of a stock broker.

A careful consideration of these cases would indicate that our supreme court would not regard plaintiff's probable profits as too speculative an element of damages.

It is stated to be true that plaintiff's sales varied somewhat according to the styles and seasons, but surely his business as disclosed by the evidence was more certain than the probable returns from any theatrical performance, and equally certain with the profits of any planing or flour mill. It is impossible to distinguish the case at bar from the jewelry jobber in the

Brethauer case. Not one word was said in the evidence on any specially advantageous sales made by plaintiff during the previous years he testified concerning, and the burden lay on the defendant, under the doctrine of *Chapman v. Kirby*, followed by the above cases, to show any depression in business or other cause that might have made plaintiff's profits less during the months in question than they had been in previous years. A coal broker or stock broker, such as is mentioned in the Flynn case in 131 App. would doubtless have much greater variation in his sales from year to year than would plaintiff in selling substantially the same line of goods to the same customers. It is clear that if plaintiff can not recover on the basis of loss of profits, he can get no compensation whatever for what must have been a serious loss. The rule applied in some cases that a recovery could be had for the rental value of the property detained could not be applied here, for a drummer's samples have no rental value to others, nor could the plaintiff have supplied their place with others. We do not think there is anything so peculiarly speculative or uncertain in plaintiff's business as to exclude proof similar to that admitted in other cases.

We next come to the consideration of the question as to whether the defendant had sufficient notice to the purpose for which the plaintiff desired his samples in Milwaukee to make it liable for loss of profits as claimed, and this is a point not free from difficulty. In this connection it should be observed that the very terms of clause 7 in the baggage coupon book referred to property "other than legal baggage." Plaintiff's card which appeared on the trunk described him as "Representing Eastern Manufacturers of Cloaks and Suits." In his conversation with the baggageman he expressly stated that they were "sample" trunks and must be in Milwaukee that night. These facts are, we think, sufficient to charge the defendant with notice of the character of the contents of the trunk. In *Hamburg-American Co. v. Gattman*, 127 Ill. 598, the court held that under all the circumstances the carrier was chargeable with notice that an immigrant's boxes contained other than legal baggage. We think the same rule would apply here. But

it is said that even so, it does not appear that the defendant had notice of the purpose for which they were desired in Milwaukee.

As we understand the law, when a party seeks to recover loss of probable profits from some special contract, he must show that the defendant had actual notice of the particular contract, but when he simply seeks to recover on the basis of his past average earnings, without regard to any special contract which might have promised exceptional profits, we do not understand that special notice to the defendant is necessary.

Substantially the same line is drawn here that is drawn in the matter of pleading. As we held in *C. & E. R. R. Co. v. Meech*, 163 Ill. 305, a general allegation of loss of profits is sufficient to allow proof of the plaintiff's particular employment and ordinary earnings, but when a claim is for a profit from a special contract, this fact must be set out in the declaration. In many cases the phrase "special damages" will be found to refer to damages arising from a special contract as distinguished from usual, average profits.

The Brethauer case in 223 Ill. 521 is to the same effect as the Meech case.

In the case at bar no question is raised as to the pleading, as no objection has at any time been made by the defendant to the admission of any evidence on the question of damages because of an alleged variance or any alleged failure on the plaintiff's part to set out in the bill of particulars his probable loss of profits as an element of damage.

In *I. C. R. R. Co. v. Byrne*, 205 Ill. 9, the court states at p. 22 and there was evidence—its exact character does not appear—tending to show that the agent was informed that the theatrical show was to be given a certain night at Bloomington, and the question as to whether the defendant had notice of such engagement was left to the jury. We take it this notice could be shown from dealings of the parties and by any facts in evidence.

In *Foster v. C., C. & St. L. Ry.*, 56 Fed. Rep. 434, cited by defendant at p. 9 of its brief, it appears that the theatrical troupe claimed damages because its properties were delayed

so as to miss two advertised performances of which the carrier knew. Because these performances were missed and salaries suspended the troupe broke up, and the plaintiff lost profits from other performances, for which he also attempted to recover. The court held:

"The loss from failure to arrive in season to give performances which the parties knew the troupe was going to Louisville to give, would come fairly within the contemplation of the parties. The loss from failure to pay the performers would not."

The opinion indicates the true test,—can the probable profits claimed be said to be fairly within the contemplation of the parties?

In the case at bar the defendant had notice that the plaintiff resided in Chicago by the terms of the contract in the coupon book and by his card. It had notice as above pointed out that the defendant was carrying trunks containing samples to Milwaukee and was specially told by the plaintiff that these sample trunks must be there at a certain time, to which defendant's agent agreed. It is fair to say that the defendant's agent was reasonably charged with notice that the plaintiff was going to Milwaukee in the ordinary course of business as a drummer and for the purpose of selling goods.

It is urged that even though the defendant could be held responsible for loss of profits in Milwaukee, it could by no possibility be held for profits in the other towns where the plaintiff went. We do not, however, think that this is a distinction of importance. The defendant was, we think, chargeable with notice that plaintiff was going on a trip, and whether he stayed in Milwaukee or not made no difference to the defendant. We think that the plaintiff is entitled to recover for loss of profits in other towns as well as in Milwaukee up to Thursday night, when plaintiff's trunk reached Appleton pursuant to plaintiff's instructions in his letter of October 9. We think he should have been on hand there to receive his trunk, and that he cannot recover for any subsequent loss of profits.

Defendant's counsel cite many cases in support of its contention on this branch of the case. Many of these cases are

distinguishable as being cases where damages were claimed for alleged loss of profits from some special contract of which the defendant had no notice. Defendant's counsel did not cite the Friedman case, 146 Ill. 583, where a commercial traveler sought to prove loss of profits from a special contract of employment, but the court held that such proof was not admissible under a general allegation of loss of profits in the declaration. It is to be noted that three judges dissented, including Judge Magruder, who wrote the opinion of the court in the later case of *I. C. R. R. Co. v. Byrne*. Subsequent cases, such as the Meech case and the Brethauer case, have distinguished the Friedman case as being a special contract case. Some of the other cases cited by defendant's counsel are distinguishable as involving proof of possible future profits without any basis of past profits to base the estimate upon. This is true of the Priestly case in 26 Ill. and the Hale case in 83 Ill. *Seaboard Air Line Ry. v. Harris*, 49 S. E. Rep. 703, seems to be in point, but we do not think would be followed in this state. We calculate plaintiff's damages as follows: Usual sales during October and November, \$40,000; commission at 8 per cent, \$3,200; usual expenses, \$600; usual net profits for two months, \$2,600. Four days are about one-thirteenth of working days in two months' period. Usual profit for four days, \$200. Plaintiff testified that he sold about one-fourth of his usual trade in these towns. That represented a profit of \$50. That is a credit that the defendant would be entitled to, leaving the net loss at \$150, and accordingly I shall find for the plaintiff in that amount.

(Criminal Court of Cook County.)

People of the State of Illinois

vs.

E. A. Davis, et al.

(February 11, 1898.)

1. CONSPIRACY—WHAT CONSTITUTES. To constitute a violation of section 46 of the Criminal Code against conspiracy there must be an intent to "wrongfully and wickedly" injure the business,

etc., of another. A fraudulent or malicious intent to injure is not enough. There must also be a purpose to carry into execution such intent.

2. **INDICTMENT—SUFFICIENCY OF IN CONSPIRACY.** An indictment for conspiracy in the words of the statute is sufficient. But if the facts constituting the conspiracy are alleged, they must show a fraudulent and malicious intent "wrongfully and wickedly" to injure, etc.
3. **CONSPIRACY—"WRONGFULLY AND WICKEDLY"—MEANING OF.** The words "wrongfully and wickedly" in the conspiracy statute are to be understood as meaning the use of means in themselves "wrongful and wicked," independently of combination.
4. **SAME.** The entering into of an agreement to use "wrongful and wicked" means to injure another does not show an intent to "wrongfully and wickedly" injure within the meaning of the conspiracy statute. There must be a wrongful and wicked intent to injure irrespective of the agreement.
5. **CRIMINAL CONSPIRACY—MUST BE CIVIL INJURY.** Where the defendants, members of a labor union, cause an employer to discharge a non-union employee, by threats to cause other employees to quit the service of such employer, this does not constitute a criminal conspiracy unless such action was an invasion of the civil rights of the non-union employee.
6. **SAME.** In such a case, in the absence of force, falsehood or any other act of itself unlawful, the non-union employee has no cause of action against the members of the union. *Allen v. Flood*, (1898) App. Cas. 1, followed.
7. **ACTIONS—MOTIVES.** The existence of a bad motive will not convert an act which is not of itself illegal into a civil wrong.

Motion to quash indictment for conspiracy. Heard before Judge Frank Baker.

F. L. Barnett, assistant state's attorney for the people.

Davidson & Trumbull, of counsel.

John F. and *Henry C. Geeting*, for defendants.

BAKER, J.—

This is a motion to quash an indictment against four defendants, which is found under and intended to charge a violation of the following provisions of section 46 of the criminal code: "If any two or more persons conspire or agree together with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment or

property of another * * * they shall be deemed guilty of a conspiracy, and every such offender, whether as individuals, or as officers of any society or organization, and every person convicted of conspiracy at common law shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding five thousand dollars, or both."

The first count of the indictment charges that the defendants were members of a certain union, viz., the Hoisting Engineers' Association; that Charles and Dennis were in the employ of the Thomas Elevator Company; that the defendants did, unlawfully, etc., conspire and agree together with the fraudulent and malicious intent to wrongfully and wickedly injure the business of Charles and Dennis by unlawfully, etc., demanding of said elevator company the discharge of Charles and Dennis for the reason to be represented to said elevator company by the defendants; that Charles and Dennis were not members of said association, and then to "call off" certain engineers in the employ of said elevator company who were members of said association, if said demand was not complied with "for the purpose then and there of stopping the work of said Thomas Elevator Company, and thus throw said Charles and Dennis out of their employment." It then avers the execution of said agreement, the demand, refusal, "calling off" of the union engineers by defendants, and avers that thereby the work of said elevator company was stopped, and by reason thereof said Charles and Dennis discharged from their employment.

The second and third counts are identical with the first, save that the intent alleged in the second is to injure the "employment," in the third the "business and employment" of Charles and Dennis. It is not alleged that any contract of employment for any period existed either between the elevator company and the union engineers, or between the company and Charles and Dennis.

To constitute an offense under the provisions of section 46 above quoted, there must be the agreement, with the fraudulent or malicious intent "wrongfully and wickedly" to injure the business or employment, etc., of another. The agreement

with the fraudulent or malicious intent to injure is not enough. The agreement must include the purpose to carry into execution the fraudulent and malicious intent to injure "wrongfully and wickedly," that is, by the use of wrongful and wicked means. It may be that an indictment in the words of the statute charging that the defendants did conspire and agree together with the fraudulent and malicious intent wrongfully and wickedly to injure Charles and Dennis in their employment would be sufficient, but in this indictment there is a precise statement of the means agreed upon by the defendants to be used to carry into effect their alleged malicious intent to injure Charles and Dennis in their employment; and hence, if the means so alleged to have been agreed upon are in law wrongful and wicked, the indictment well and sufficiently charges a conspiracy under the statute. And, on the other hand, if the means so set out in the indictment are not wrongful and wicked, the indictment cannot be held to well or sufficient charge a conspiracy under the statute, for, if the means which the indictment alleged were agreed upon to be used are not wrongful and wicked, in no just sense can the indictment be held to charge a conspiracy and agreement by the defendants with the fraudulent and malicious intent, "wrongfully and wickedly" to injure Charles and Dennis. The words "wrongfully and wickedly" in the statute are to be understood as meaning the use of means in themselves "wrongful and wicked" independently of combination. We cannot say that the means are wrongful and wicked, because of the agreement to use such means to carry out a malicious intent to injure. The thing prohibited is an agreement with the malicious intent wrongfully and wickedly to injure. Whether such intent exists depends upon the means agreed upon to be used to carry out the malicious intent to injure. To say that the means agreed upon are wrongful and wicked because of the agreement to use such means to carry out the malicious intent to injure, amounts to saying that the means received a character of wrongfulness and wickedness from the agreement to use such means in a manner which depends for its own wrongfulness and wickedness upon the means so agreed upon.

The means set out in the indictment as the means agreed upon by the defendants to be used to carry out their malicious intent to injure Charles and Dennis in their employment are, in substance, that the defendants agreed together to demand the discharge of Charles and Dennis by the elevator company for the reason to be stated to said company, that Charles and Dennis were not members of the Hoisting Engineers' Association, of which the defendants were members, and certain engineers in the employ of said company were also members; and to notify said company that in case of refusal to discharge Charles and Dennis, the defendants would "call off" from the employment of the elevator company the members of said association "for the purpose of then and there stopping the work of said elevator company and thus throw said Charles and Dennis out of their employment." There are cases which hold that a combination and agreement to use such means as this indictment avers the defendants agreed together to use, is an indictable conspiracy. At one time the associations, which in our day are known as trade unions, or labor organizations, would have been regarded as against public policy, as conspiracies in restraint of trade. I shall attempt no review of the authorities, no history of legislation either here or in England. It is sufficient to say that there has been a most marked change in public policy towards such organizations. There and here such organizations are now recognized by law. The acts in question are not criminal independently of combination, but acts may be wrongful and wicked, though not criminal. Acts may be wrongful in morals, or wrongful in law. It is only with the question whether the acts in question are wrongful in law that we are concerned.

I shall not attempt to define or limit the words "wrongfully or wickedly" as used in the statute. It is sufficient to say that in cases like this where there is no suggestion of fraud, immorality, injury to the public, or violation of contract, there must at least be a civil wrong, an invasion of the civil right of another, carrying with it the liability to repair the natural and direct consequences, where injury results to the person whose rights are infringed or invaded.

If the acts which the indictment alleges the defendants agreed to do, to compass the discharge of Charles and Dennis with the malicious intent to injure them, constitute an actionable civil wrong, they must be regarded as wrongful and wicked, in law, and if they do not amount to a civil wrong and are not criminal, they cannot be regarded as wrongful and wicked in law. Upon the question whether such acts, if done maliciously, constitute a civil wrong, we have no authorities in Illinois, and I shall refer to but a single case, the case of *Allen v. Flood*, decided by the House of Lords December 14, 1897, 42 Solicitor' Journal, 149.¹ In that case the act complained of by plaintiffs was the act of Allen, the local delegate of a union, in demanding the discharge of plaintiffs by their employer, an iron company, and causing their discharge by giving notice to the iron company that unless the company discharged the plaintiffs, he would call out from its employ all the members of the union of which he was a delegate. And it was alleged and the jury found that Allen acted maliciously with intent to injure the plaintiffs. The plaintiffs had judgment, and that judgment was affirmed in the Court of Appeals, but reversed by the House of Lords. In the course of his opinion Lord Watson said: "The existence of a bad motive in the case of an act, which is not of itself illegal, will not convert that act into a civil wrong. A wrongful act, done knowingly, with a view to its injurious consequences may, in the sense of law, be malicious, but such malice derives its essential character from the circumstances that the act done constitutes a violation of law." Lord Herschel, in the course of his judgment, said: "If they (the members of a union) resort to unlawful acts, they may be indicted or sued. If they do not resort to unlawful acts, they are entitled to further their interests in the manner which seems to them best and most likely to be efficient. * * * I do not doubt that every one has a right to pursue his trade or employment without 'molestation' or 'obstruction,' if those terms are used to imply some act of itself wrongful. This is only a branch of a much wider proposition,

¹ App. Cas. (1898) 1.—Ed.

namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful, always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition, in my opinion, has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is, in law, a right of precisely the same nature and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right, of which I have already spoken. The wider right embraces also the right of free speech. A man has a right to say what he pleases to induce, to advise, to exhort, to command, provided he does not slander or deceive, or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with someone else in his calling?" The legal principle settled by the case is, that the existence of a bad motive will not convert an act which is not of itself illegal into a civil wrong.

The test laid down, to determine what acts of members of trades unions of the nature here under consideration are innocent and what wrongful, is that, if the members of a union resort to unlawful acts, they may be indicted or sued. If they do not resort to unlawful acts, they are entitled to further their interests in the manner which seems to them best and most likely to be effectual, and both are to my mind correct and salutary rules. The latter is, after all, but a restatement in different words of the rule laid down by Chief Justice Shaw, in 1842, in the case of *Commonwealth v. Hunt*, 4 Metcalf (Mass.) 134, when he said, "the legality of such an association (a trades union) will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is to say the least, innocent; if by falsehood or force, it may be stamped as an illegal conspiracy."

There is no suggestion, even in the indictment, that the agreement into which it is alleged the defendants entered, contemplated the use of force, falsehood or any other act of itself unlawful, and in my opinion it follows that the acts which the indictment alleges the defendants agreed to do, the means they agreed to use cannot be held in law wrongful or wicked.

The views here expressed find confirmation in the following provision of our criminal code, section 158: "If any two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing, by threats, suggestions of danger or any unlawful means, any person from being employed by, or obtaining employment from any such owner or possessor of property on such terms as the parties concerned may agree upon, such persons so offending shall be fined not exceeding \$500.00, or confined in the county jail not exceeding six months," for under well settled rules of construction it is but reasonable to infer that the legislature, in adopting section 158 as a section of the act of which section 46 was another section, intended to embody in section 158 all matter in relation to interference by combination and agreement between employee and employer, between capital and industry, which it was thought proper to make the subject of a special criminal law.

The case involves questions of great interest, and has been fully and most ably argued. It is to be regretted that the judgment about to be pronounced cannot be reviewed by our supreme court. That judgment is that the motion to quash the indictment must be sustained.

NOTE.—See in addition to *Allen v. Flood*, *supra*, the later cases of *Quinn v. Leatham*, (1901) App. Cas. 495; *South Wales Miners' Federation v. Glamorgan Coal Co., Ltd.*, (1905) App. Cas. 239. See, also, in general, *London Guarantee & Accident Co. v. Horn*, 206 Ill. 493; *Thomas v. Cincinnati, etc., Ry. Co.*, 62 Fed. 803; *Moore v. Bricklayers' Union*, 23 Week. Cin. L. B. 48, 10 Ohio Dec. Rep. 665; *Temperton v. Russell*, 1 Q. B. 715; *Carew v. Rutherford*, 106 Mass. 1; *Toledo, etc., Ry. Co. v. Penn. Co.*, 54 Fed. 730; *Steamship Co. v. McKenna*, 30 Fed. 48.—Ed.

[(*Supreme Court of Illinois.*)]

E. E. Clark

vs.

William E. Robinson.

(January Term, 1878.)

BRIEFS. Extension of time to file.

O. B. Ficklin, A. J. Fryer, and H. S. Clark, for appellant.
Charles Bennett, for appellee.

SCOTT, J.:—

An application for an extension of time on the part of the appellee to file his brief. Time will be extended six days, in addition to that allowed by rule. The cause, however, will be taken as though the time had not been extended.

See also 88 Ill. 498.—Ed.

[(*Supreme Court of Illinois.*)]

Harrison Moss

vs.

The Village of Oakland.

(January Term, 1878.)

APPEAL. Motion to dismiss for want of a sufficient bond. Leave to amend allowed.

WALKER, J.:—

There is a motion entered to dismiss the appeal for want of a sufficient bond, and there is a cross motion for leave to amend and file a sufficient bond. Leave will be given to file a sufficient bond within five days.

INDEX.

A.

ABUTTING OWNERS,

- have peculiar interest in street or park which equity will protect to prevent diversion from dedicated purpose, 79.
- no defense to diversion of street or park from dedicated purpose that abutting owner benefited, 79.
- when precluded from enforcing rights by laches, 79.

ACTIONS, see PENALTIES,

- existence of bad motive does not make act wrongful if otherwise legal, 516.

ADMINISTRATION OF ESTATES, see COUNTY COURTS, EXECUTORS AND ADMINISTRATORS,

- interest on specific and general legacies, 256.
- how interest on legacies applied, 256.
- when legatee can have legacy advanced by executing bond, 256.
- executors holding paramount title not bound by decree in proceedings to foreclose mortgage given by devisees if their title is not attacked, 353.
- mortgage by executors subject to debts of subsequent claimants in probate proceedings, 353.
- rights of creditors of deceased not affected by proceedings under mortgage given by devisee after death of testator, 353.
- neither creditors nor executors proper parties to foreclosure of mortgage given by devisee, 353.

ANIMALS,

- right to hold another's cattle where duty upon holder to repair partition fence, 211.

ANTI-SCALPER Act of 1875, construed, 62.

APPEAL AND ERROR, see JUDGMENTS, MANDAMUS,

- filing of bond ordinarily necessary to stay proceedings, 277.
- where appellant is of class mentioned in section 98 of Practice Act no bond necessary to stay proceedings in lower court, 277.
- purchaser at foreclosure sale cannot be made party to record in supreme court, 350.
- entry of appearance of appellee in supreme court does not entitle appellant to continuance, 350.
- minor heirs need not sign bond where guardian prays appeal, 352.
- appellee must see return made in time upon suggestion of diminution of record and motion for *certiorari*, 353.
- writ of error lies where no other mode of review, 442.
- where dismissal of appeal will be set aside, 443.
- appeal will be dismissed where record does not show judgment, 443.

APPEAL AND ERROR, continued—

- when cause will not be remanded, 444.
- dismissal of appeal on account of defective bond, 444.
- leave to amend allowed on motion to dismiss appeal for want of a sufficient bond, 524.

APPEARANCE, see APPEAL AND ERROR.**ARREST,**

- an execution against the body is only authorized in the three cases provided by statute, 251.
- when writ upon which body of debtor is held insufficient, 252.
- when writ upon which body of debtor held purports to be issued for one of the three statutory reasons it is presumed to be a proper writ, 252.
- body execution writ reciting issuance in "action of trespass" shows issuance in tort action and justifies detention, 252.

ASSIGNMENTS,

- for benefit of creditors, when valid, 237.
- will prevail over subsequent executions, 237.
- effect of omission to make inventory of assets and list of creditors, 237.
- subsequent execution not entitled to priority, even though assignee has not entered into bond, 237.
- title passes to assignee from date of delivery of deed, 237.
- possession of property is equivalent to record of deed, 237.

ASSOCIATIONS,

- liability of members of association doing business under name of existing corporation, 136.

B.**BAIL,**

- court of another circuit than that in which prisoner indicted and held cannot admit to bail, 385.
- power of surety to make surrender in criminal case outside of county, 445.
- section 14, division 111, of Criminal Code, construed, 445.

BANKRUPTCY,

- cannot stay proceedings in a court of law where discharge cannot be granted, 225.
- right to set off in equity unmatured debts as "mutual debts and credits," 262.

BILLS OF EXCEPTIONS,

- not stricken where presented in time and failure to file in time due to action of judge, 452.

BY-LAWS, see MUTUAL BENEFIT SOCIETIES.**C.****CAPIAS AD RESPONDENDUM, see ARREST.****CARRIERS, see CONSTITUTIONAL LAW, STATUTES,**

- railroad companies proper subjects of police power, 58.
- cannot exempt by contract loss due to detention of excess baggage through negligence, 507.
- objection that articles are not baggage waived where accepted as such, 507.

- CARRIERS, continued—**
 liable for loss of ordinary profits where sample trunks detained through negligence, 507.
 when carrier has notice of contents of trunks, 507.
- CERTIORARI, see APPEAL AND ERROR.**
- CLERGYMAN AND PARISHIONER,**
 when transactions between violate public policy, 137.
- COLLATERAL ATTACK, see JUSTICES OF THE PEACE, OFFICERS.**
- COMMERCE,**
 discrimination against particular ports and vessels in use of wharf, 20.
- COMMITMENT, see REFORM SCHOOLS.**
- COMMON LAW MARRIAGE, see HUSBAND AND WIFE.**
- CONFLICT OF LAWS, see HUSBAND AND WIFE, INTERNATIONAL LAW.**
- CONSPIRACY,**
 what does not constitute criminal conspiracy, 516.
 to constitute criminal conspiracy there must be invasion of civil rights, 516.
 what constitutes, under section 46 of criminal Code, 516.
 indictment in words of statute sufficient, 516.
 meaning of "wrongfully and wickedly" in statute, 516.
- CONSTITUTIONAL LAW, see CARRIERS, HIGHWAYS, PARKS, SUNDAY, UNITED STATES,**
 act prohibiting sales of railroad tickets by unauthorized persons, constitutional, 58.
 nature of police regulations for legislature to determine, 58.
 act prohibiting sales of railroad tickets by unauthorized brokers unconstitutional, 61, 65, 125.
 citizen under police powers may be deprived of property without compensation, 65.
 rights of citizen may not be arbitrarily invaded under guise of police power, 65.
 railroad anti-scalper law interference with property rights of citizens, 66.
 legislature cannot make it crime to sell that which is not dangerous to health, morals or general welfare, 66.
 doubts should be resolved in favor of constitutionality of legislative acts, 208.
 under the constitution of 1870 damages incurred by the taking of private property for a road must be determined by a jury, 218.
 Practice Act which permits service of process on agent in suit against partnership is unconstitutional, 427.
 discrimination against citizens of other states, 427.
 power of state as *parens patriae*, 492.
 when Reform School Act unconstitutional, 492.
- CONTEMPT, see REPLEVIN,**
 compliance with municipal regulations no defense as order of court of competent jurisdiction is good defense to violation of such regulations, 381.

CONTEMPT, continued—

- all directors voting to violate injunction guilty of contempt, 448.
- what are mitigating circumstances where director votes to violate injunction, 448.
- when advice of counsel good defense, 448.
- officer following directions of directors to violate injunction in contempt, 448.

CONTRACTS, see INSURANCE, MONOPOLIES, MUTUAL BENEFIT SOCIETIES,

- relief in equity against improvident contract, 135.
- relief where undue influence used, 136.
- when contracts between clergyman and parishioner set aside, 136.
- undue influence of clergyman over parishioner in execution of instrument, 136.
- intent and knowledge essential to ratification of, 137.
- void agreement cannot be ratified, 137.
- relief with respect to, where party wronged sought independent advice, 137.
- cannot repudiate contract as against third person, 138.
- one can contract to sell property to certain persons and none other as long as no crime committed, 290.
- contracts declared criminal as in restraint of trade will not be enforced by courts, 290.

CORPORATIONS, see CONTEMPT, EQUITY,

- power to hold stock in other companies, purpose of, 1.
- effect of purchase of stock in name of third person, 1.
- complete monopoly not necessary to invalidate purchase of stock, 1.
- power of foreign corporation as to purchase of stock in Illinois corporation, 1.
- purpose of purchase immaterial when tendency is to suppress competition or create a monopoly, 1.
- purchase of majority of stock of domestic corporation by foreign corporation is *ultra vires*, 1.
- conditions of relief in setting aside purchase of stock of competing corporation, 1.
- right to issue preferred stock, 35, 46, n.
- estoppel to question validity of preferred stock, 35.
- right to deal in its own shares, 35.
- rights of pledgees of corporate stock, 35.
- liability of members of association doing business under name of existing corporation, 136.
- effect of carrying on corporate business as an unincorporated association, 137.
- fact that a capital stock held by one person does not excuse making corporation a party, 138.
- not represented in legal proceedings by its officers and stockholders, 138.
- in absence of fraud, breach of trust or *ultra vires*, stockholders cannot interfere in management, 366.
- undertaking of corporation based on donation with conditions attached can be rescinded upon imposition of new conditions, 366.
- criminal liability of officers and directors, 393.
- no criminal liability where no civil liability, 393.

COUNTY COURT,

county court has same power to compel executor to invest funds of legatee as court of chancery, 256.

constitution expressly extends its jurisdiction to all probate matters, 256.

COURTS, see BAIL, COUNTY COURTS, HABEAS CORPUS, LIS PENDENS, REFORM SCHOOLS,

only method of prosecution in criminal court is by indictment, 48.
in case of conflicting jurisdiction the court which first takes cognizance of the controversy should retain jurisdiction to the end of the litigation and take possession of the subject-matter thereof, 94.

a court does not lose jurisdiction to appoint its own receiver where after a bill filed for that purpose before it a receiver is appointed in another court of concurrent jurisdiction for the same property, 94.

circuit courts have jurisdiction on *habeas corpus* to determine constitutionality of legislative acts, 125.

no jurisdiction to prohibit complainant from enforcing decrees entered in circuit courts, 227.

consent cannot confer jurisdiction of subject-matter, 429.

city court has jurisdiction over whatever land city holds and governs by its city council, 492.

CREDITORS, see ADMINISTRATION OF ESTATES.**CRIMINAL COURTS, see COURTS.****CRIMINAL LAW, see BAIL, GRAND JURY, HOMICIDE, INDICTMENT, PERJURY,**

obtaining money under false pretences, statutory offense, 100.

what allegations constitute sufficient showing to charge crime of obtaining money under false pretences, 100.

what constitutes criminal carelessness while in charge of public conveyance, 393.

principal not criminally liable for the negligent act of his agent, 393.

CRIMINAL PROCEDURE, see COURTS.**D****DAMAGES, see CARRIERS.****DEDICATION, see PARKS,**
defined, 453.**DIMINUTION OF RECORD, see APPEAL AND ERROR.****E****ELECTIONS, see MANDAMUS,**

remedy to compel administration of election law is at law and not in chancery, 265.

decision of board of election commissioners as to propriety of question petitioned to be submitted under "public policy act" not final, 265.

if question of public policy submitted by requisite number of voters, board of election commissioners must place it on ballot, 265.

ELECTIONS, continued—

if election officials refuse to put a proper question properly petitioned for on ballot, *mandamus* will lie to compel them to their duty, 265, 283.

change of venue in election contest, 429.

remanding cause when improperly removed, 429.

in case of fraud all votes except those proven legitimate will be thrown out, 434.

votes cast by persons naturalized in county court are illegal, 434.

EQUITY, see ABUTTING OWNERS, CORPORATIONS, FRAUD, INJUNCTIONS,

MAXIMS, PARKS, RECEIVERS, UNDUE INFLUENCE,

not necessary to show tendency of acts alleged, 1.

when relief granted on account of undue influence, 135.

relief against improvident contract, 135.

relief in, on account of abuse of confidential relations, 136.

burden of proof to show absence of undue influence, 136.

laches excused where delay caused in efforts to compromise, 137.

persons cannot be prejudiced for mispleading or want of form, 138.

equity has no jurisdiction to entertain bill by complainant to compel another to convey land to him where he is out of possession, as he has an adequate remedy at law, 212.

fact that defendant has a deed from prior holder, executed to supply one lost in the chain of title does not give equity jurisdiction to compel a conveyance, 212.

reference to other pleadings on demurrer to cross-bill, 226.

demurrer to cross-bill must be overruled where complainant seeks to establish an easement in cross-complainant's land, and the latter seeks to remove the cloud on his title, 226.

no jurisdiction to determine right of party to condemn land where law claimed to be unconstitutional as remedy is at law, 227.

United States not necessary party to bill to close fair on Sunday, where none of its property rights involved, 366.

taxpayer and stockholder proper party to enjoin diversion of public property from dedicated use by private corporation, 366.

when temporary injunction enjoining closing of park on Sunday will issue, 366.

equity presumes fraud where parties occupying fiduciary relationship induce fiduciary to sell and then they buy in at resultant sale, 385.

ESTOPPEL, see INSURANCE,

when one of public can enjoin diversion of public property from use for which acquired, 452.

to question validity of preferred stock, 35.

knowledge of facts essential to, 313.

party claiming must have been mislead to prejudice, 313.

equal knowledge of facts bars a claim of estoppel, 313.

EVIDENCE, see HUSBAND AND WIFE, PERJURY,

judicial notice will be taken of fact that large corporations seek to absorb competitors, 1.

value of letters as, 135.

party cannot complain of evidence brought out on cross-examination of opponent's witness, 213.

EXECUTIONS, see ARREST.

EXECUTORS AND ADMINISTRATORS, see **ADMINISTRATION OF ESTATES, COUNTY COURTS**,
cannot have relief in individual capacity where rights appertain to representative capacity, 138.
prima facie chargeable with interest after first year, 256.
foreign consul should not be appointed, 373, 374.
Illinois law not statute of congress governs appointment, 374.
EXTRADITION, see **HABEAS CORPUS**.

F.

FALSE PRETENCES, see **CRIMINAL LAW**.
FENCES, see **ANIMALS**.
FORCIBLE ENTRY AND DETAINER, see **FORMER ADJUDICATION**,
on suit on appeal bond given by defendant it is competent to show the value of use and occupation of premises, 213.
FOREIGN CORPORATIONS,
power to hold stock in Illinois corporation, 1.
are subject to same regulations as domestic corporations, 1.
purchase of stock of domestic corporation *ultra vires*, 1.
FORMER ADJUDICATION, see **ADMINISTRATION OF ESTATES, JUDGMENTS**.
FRAUD,
must be clearly shown, suspicious circumstances insufficient, 135.

GRAND JURY,
validity of acts where service improper, 393.
effect of failure to certify selection of grand jurors within five days, 393.
necessity of having evidence on finding of second indictment, 393.
effect where witnesses not sworn by foreman, 393.
presence of state's attorney in grand jury room, 393.
effect of reconvening after adjournment without entry of reconvening order, 393.
power of court to reconvene grand jury after adjournment, 393.
GUARDIAN AND WARD, see **APPEAL AND ERROR**.

H.

HABEAS CORPUS, see **COURTS, JUSTICES OF THE PEACE**,
on *habeas corpus* in extradition proceedings court cannot consider whether or not crime has been committed, 99.
in extradition proceedings good faith of prosecution cannot be inquired into, 99.
court should in extradition proceedings examine into the sufficiency of the extradition papers and see if a crime is charged, 100.
what shows in extradition proceedings that warrant and affidavit from demanding state is sufficient, 100.
it is proper practice to allow return to writ of *habeas corpus* in extradition proceedings to be amended to show relator charged with crime in demanding state if such be the fact, 100.

HABEAS CORPUS, continued--

- practice on return, 251.
- effect of demurrer to return, 251.
- original not auxiliary writ, 492.

HIGHWAYS,

- proceedings under law of 1845 for ascertainment of damages incurred by establishment of road unwarranted under constitution of 1870, 208.
- the establishment of a road over an individual's land is a taking of private property for public use, 208.

HOMICIDE,

- must be causal connection between negligent act and death to establish manslaughter, 393.

HUSBAND AND WIFE,

- marriage valid where made, valid everywhere, 302.
- courts cautious to declare against marriage celebrated according to peculiar rites of a particular sect or race, 302.
- marriage between slaves treated as valid after emancipation, 302, 308.
- what constitutes marriage in absence of legal ceremony, 310.
- common-law marriage may be proven by declarations, conduct of parties and reputation, 310.

I.**INDICTMENT, see CONSPIRACY, COURTS, GRAND JURY, PENALTIES,**

- misjoinder of defendants, 393.
- joinder of defendants for neglect of duty, where duty not joint, 393.
- each count must contain single issue, 393.
- what constitutes duplicity, 393.
- allegation as to duty, 393.
- for criminal carelessness for failure to establish rules for operation of railroad should set out rules, 393.
- in criminal pleading the highest degree of certainty is required, 477.

INJUNCTION, see CONTEMPT,

- no right to prevent misappropriation of public property in absence of special damage, 20.
- laches as bar to, 20.
- complainant must do equity, 20.
- private individual cannot redress public nuisance, 20.
- balancing of conveniences when considering issuance, 80.
- balancing of conveniences, 227.
- not ordinarily issued against commission of crime but will be where irreparable property loss about to be inflicted on citizen, 290.

INSURANCE, see MUTUAL BENEFIT SOCIETIES.

- effect of surplus line fire insurance act of 1903 on foreign insurance corporations, 110.
- premiums paid after forfeiture recoverable, 313.
- implied waiver and estoppel synonymous in insurance law, 313.
- where contract ambiguous, interpretation should favor insured, 313.

INTERNATIONAL LAW,

condition of slaves follows fortunes of war, 302.

J.**JOINT ADVENTURES,**

liability of members of to creditors and subscribers, 136.
effect of secret agreement, 136.

JUDGMENTS, see ADMINISTRATION OF ESTATES,

views of supreme court binding on lower court after remanding, 1.

in suit for damages for unlawful detention of premises, plaintiff cannot split cause of action but must recover for all the time they have been detained, 213.

if a point is left undecided by supreme court in its decree the language of the opinion will be construed so as not to foreclose the decision of the point by the trial court, 227.

former adjudication not a bar unless question set up actually adjudicated or might have been adjudicated, 353.

JUDICIAL NOTICE, see EVIDENCE.**JUDICIAL SALES, see APPEAL AND ERROR.****JUSTICES OF THE PEACE,**

right to office cannot be attacked on *habeas corpus*, 248.

K.**KNOWLEDGE, see ESTOPPEL, PRINCIPAL AND AGENT.****L.****LACHES, see ABUTTING OWNERS, EQUITY, INJUNCTIONS.****LIBEL AND SLANDER,**

a witness may testify as to the effect produced upon him by a libel, 477.

LIS PENDENS,

to be of controlling force in question of jurisdiction must cover all indispensable parties, 94.

M.**MANDAMUS,**

existence of remedy by *certiorari* no defense to remedy by *mandamus*, 265.

is ordinary action at law in Illinois, 277.

perfection of appeal suspends force of writ, 277.

MARRIAGE, see HUSBAND AND WIFE.**MAXIMS,**

in *part delicto*, 110.

equity imputes good faith rather than bad, 385.

MISDEMEANORS,

violations of pharmacy act misdemeanors since not felonies, 48.

MONOPOLIES, see CORPORATIONS,

what constitutes, 1, 20.

when agreement violates anti-trust acts of Illinois, 290.

- MORTGAGES**, see **ADMINISTRATION OF ESTATES, APPEAL AND ERROR**,
reasonableness of solicitor's fees on foreclosure, 35.
what necessary to effect subrogation of new mortgage to old, 353.
- MOTIVE**, see **ACTION**.
- MUNICIPAL CORPORATIONS**, see **COURTS, CONTEMPT, PARKS, WATERS**,
platting and dedicating street vests fee in city, 79.
- MUTUAL BENEFIT SOCIETIES**, see **INSURANCE**,
just and reasonable contracts and by-laws enforced by courts, 313.
contract to be bound by after enacted by-laws, binding if by-laws
so enacted are reasonable, 313.
officers of subordinate council cannot waive substantial provi-
sion of contract, 313.
subordinate council may waive forfeiture, 313.
effect of by-law making subordinate council agent of insured,
upon power to waive forfeiture, 313.

N.

- NOTICE**, see **PRINCIPAL AND AGENT, CARRIERS**,
sufficiency of publication notice, 207.
- NUISANCE**,
private individual cannot redress unless specially damaged, 20.

O.

- OFFICERS**, see **JUSTICES OF THE PEACE**,
what is an officer *de facto*, 248.
no collateral attack on right to office of officer *de facto*, 248.

P.

- PARENT AND CHILD**,
parent must provide for support of infant child, 221.
contract express or implied must be shown to hold parent for
necessaries furnished child, 221.
parent liable for goods furnished infant which are absolutely
necessary to enable infant to live, 221.
mother has same duty as regards supporting infant after death
of father as latter had, 221.
- PARKS**, see **EQUITY, INJUNCTION**,
where public park is used as exposition, taxpayer has no right
to have it remain open on Sunday, 20.
where park is ceded to United States state court no right to in-
terfere, 20.
equity should not interfere with a person put in possession of
park property by a constitutional legislative act at the suit
of a person consequently damaged, 80.
the erection of a building for works of art is not a perversion of
the uses of a park, 80.
the fact that a building for works of art, with free admission
at certain times may be erected in a park by a private cor-
poration, where that corporation is not organized for profit,
does not detract from its public character, 80.

PARKS, continued—

- the legislature has full power to change the public use of property held by a municipal corporation in its governmental capacity, 80.
- what is a public park, 227.
- dedication of land for, 227.
- distinguishable from a common, 227.
- legislature can divert land acquired for park purposes to other than park purposes, 453.
- what does not amount to a dedication of land to park purposes, 453.
- where land held by municipality for park purposes, legislature can authorize a change of those purposes, 453.

PARTIES, see APPEAL AND ERROR,

- corporation is a necessary party, even though all its stock is held by defendant, 138.
- corporation not represented in legal proceedings by its officers and stockholders, 138.
- duty of court to require all persons in interest to be brought in court, 138.

PARTNERSHIP,

- validity of service of process on agent, 427.

PENALTIES, see MISDEMEANORS, STATUTES,

- penalties for violation of pharmacy act, recoverable either in action of debt or in criminal prosecution, 48.
- violations of pharmacy act not indictable, 48.

PERJURY,

- a witness may testify as to effect produced upon him by a libel and such testimony is material, 477.
- where a witness is cross-examined with respect to matters not germane to the direct testimony perjury cannot be assigned on such cross-examination, 477.
- it is insufficient to set out in indictment the substance of false testimony, 477.
- indictment can be based on false statements of witness that he did not remember, 477.
- indictment must allege that false testimony was material to the issue or point in question, and it is insufficient to merely allege that it was material to the issues in general, 477.

PERPETUITIES,

- rule against pious trusts, 136.

PERSONAL MANAGEMENT AND CONTROL,

- what constitutes, 393.

PHARMACY, see MISDEMEANORS, PENALTIES.**PIERS, see WATERS.****PIOUS TRUSTS,**

- rule against perpetuities violated by, 136.

PLEDGES, see CORPORATIONS.**POLICE POWER, see CARRIERS, CONSTITUTIONAL LAW.****PRACTICE, see APPEAL AND ERROR,**

- section 13 of Practice Act unconstitutional, 427.

PRINCIPAL AND AGENT,

an agent receiving money on behalf of principal cannot retain it by setting up that transaction out of which it grew, was illegal, 110.

knowledge of agent, knowledge of principal where acting in scope of authority, 313.

criminal liability of principal for negligent acts of agent, 393.

PROCESS, see REFORM SCHOOLS.**PROXIMATE CAUSE, see HOMICIDE.****PUBLICATION,**

sufficiency of notice, 207.

PUBLIC POLICY, see CONTRACTS,

transactions between clergyman and parishioner, 137.

PUBLIC POLICY ACT, see ELECTIONS,

what is not in general, question of public policy, 265.

particular question held one of public policy, 265.

only three propositions can be submitted at one election, 265.

but one question can appear on one petition, 265.

PUBLIC PROPERTY, see EQUITY, INJUNCTION, PARKS.**PUBLIC USE, see WATERS,**

right to abandon, 20.

R.**RATIFICATION, see CONTRACTS.****REAL PROPERTY, see TRUSTS.**

rule in Shelley's case defined, 54.

RECEIVERS, see COURTS,

power of equity to appoint, 384.

principles governing appointment, 384.

sufficiency of evidence to appoint on motion, 384.

RECORD, see APPEAL AND ERROR.**REFORM SCHOOLS, see CONSTITUTIONAL LAW.**

under Reform School Act of 1869, judge, officer of special and limited jurisdiction, 492.

summons under Reform School Act must be served on party therein indicated or jurisdiction defeated and commitment void, 492.

RELIGIOUS CORPORATIONS,

"pious trusts" in real estate, rule against perpetuities, 136.

REPLEVIN,

defendant retaking property recovered of him under replevin writ guilty of contempt, 381.

RES ADJUDICATA, see JUDGMENTS.**RESTRAINT OF TRADE, see CONTRACTS, MONOPOLIES.****RIPARIAN RIGHTS, see WATERS.****S.****SERVICE OF PROCESS, see PRACTICE.****SLAVES, see HUSBAND AND WIFE.**

STATUTES, see MISDEMEANORS, PENALTIES, PUBLIC POLICY ACT, REFORM SCHOOL STATUTES.

form of action prescribed in penal statute exclusive, 48.

if meaning clear no need for construction, 281.

to be construed in *pari materia*, 492.

STAY, see BANKRUPTCY.

STREETS AND HIGHWAYS, see ABUTTING OWNERS, MUNICIPAL CORPORATIONS.

SUBROGATION, see MORTGAGES.

SUNDAY, see EQUITY,

Illinois Constitution forbids public fair being closed on Sunday because of religious principle, 366.

not assumed that opening of a public fair on Sunday will disturb peace and good order of society, 366.

W.

WAIVER, see CARRIERS, INSURANCE.

WATERS,

riparian rights, building piers and wharves, 20.

riparian rights depend on title to bank, 20.

riparian rights not affected by ebb and flow of tide, 20.

riparian rights in Lake Michigan, 20.

whether wharves built in connection with public property are public or private, 20.

whether riparian owner can extend his structure beyond point of navigation, 20.

whether wharves public or private, 20.

exclusive right to steamer to use wharf, 20.

when wharf affected with public use, 20.

discrimination against particular ports or vessels, 20.

right to abandon public pier, 20.

WHARVES, see WATERS.

WORDS AND PHRASES,

rule in Shelley's case, 54.

action, 429.

dedication, 453.

INDEX TO NOTES, BRIEFS AND FORMS.

ACTIONS, see CORPORATIONS.

CONSPIRACY,
in labor union cases, 523, n.

CONSTITUTIONAL LAW,
validity of reform school legislation, 500, n.

CORPORATIONS,
criminal responsibility of officers and directors of, 415, n.
civil liability for negligence, 420, n.
right to issue preferred stock, 46, n.

COURTS,
conflict of jurisdiction between state and federal courts, 99, n.

CRIMINAL LAW, see CRIMINAL NEGLIGENCE, GRAND JURY, INDICTMENT, PERJURY,
responsibility of officers and directors of corporations, 415, n.
criminal responsibility where no civil liability, 422, n.

CRIMINAL NEGLIGENCE,
liability for, 416, n.

EVIDENCE, see GRAND JURY, LIBEL AND SLANDER.

EXECUTORS AND ADMINISTRATORS,
payment of legacies (brief), 258.

GRAND JURY,
hearing evidence on second indictment, 424, n.

INDICTMENT,
form of, for manslaughter, 398.
form of, for criminal carelessness, 407.
form of, for perjury, 478.
requisites of, in perjury (brief), 485.
hearing evidence on second indictment, 424, n.
misjoinder of defendants in, 414, n.

LEGACIES, see EXECUTORS AND ADMINISTRATORS.

LIBEL AND SLANDER,
competency of testimony as to effect of impression of words (brief), 487.
competency of testimony as to effect of libel on readers (brief), 487.
essentials of a declaration in libel suit (brief), 487.
effect of innuendo (brief), 487.

MANSLAUGHTER see INDICTMENT.

MISJOINDER, *see* INDICTMENT.

MONOPOLIES AND TRUSTS,
the Illinois acts, 297, n.

NEGLIGENCE, *see* CORPORATIONS, CRIMINAL NEGLIGENCE.

OFFICERS AND DIRECTORS, *see* CORPORATIONS, CRIMINAL LAW.

PERJURY,

sufficiency of indictment for (brief), 485.

must show jurisdiction of court (brief), 485.

false testimony cannot be set out in substance only (brief), 485.

deputy clerk cannot administer oath (brief), 485.

cannot be assigned on cross-examination where original testimony not material (brief), 485.

"PERSONAL MANAGEMENT,"

what constitutes, 412, n.

PLEADING, *see* LIBEL AND SLANDER.

REFORM SCHOOL,

validity of legislation concerning, 500, n.

WORDS AND PHRASES,

"personal management" defined, 412, n.





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